defendant has denied that he has engaged in any of the criminal conduct with which he is presently charged and when the jury will be asked to choose between the defendant's version of events and that provided by the government witnesses, this factor weighs against admitting the conviction). "If, on the other hand, the defense can establish the subject matter of the defendant's testimony by other means, the defendant's testimony is less necessary, so a prior conviction is more likely to be admitted." *Caldwell*, 760 F.3d at 288; *see also United States v. Causey*, 9 F.3d 1341, 1344 (7th Cir. 1993) (finding that defendant "did not obviously need to testify to raise his various defenses" because several other defense witnesses provided the same testimony).

Mr. Davis maintains his innocence of all the charges and the jury will be asked to choose between Mr. Davis's version of events and that provided by the government witnesses. Davis Aff. ¶ 6. Therefore, Mr. Davis's testimony is fundamentally important to his defense. *Guerrier*, 511 F. Supp. 3d at 565. The prosecution has strong evidence against Mr. Davis, including testimony from five witnesses indicating that he stole the Social Security check on July 1, 2022, and cashed that same check on July 5, 2022. Davis Aff. ¶ 5. Vivian Vincent ("Ms. Vincent"), the complainant, will testify to the following things that happened on July 1 that led her to believe that Mr. Davis stole her check before 10 AM that day when she checked her mailbox: she heard suspicious noises coming from Mr. Davis's apartment at around 8:30 or 9 AM, Mr. Davis did not go to work by 8 AM like he usually does, and at 6 PM Mr. Davis ignored her salutation and suspiciously ran up the stairs to his apartment, at which point she remembered that she had mentioned to Mr. Davis several times before that she received Social Security. *Id*. ¶ 4. Emma Ployee, an employee of the Social Security Administration, will testify to records from her office which show that a Social Security check for $643.28 was in fact mailed to Ms. Vincent on June 29, 2022, so the disappearance of the check is not their fault. *Id*. Gordon Krantz ("Mr. Krantz"), a mail carrier

whose route includes Ms. Vincent's Street, will testify that he delivered the mail between 9:25 and 9:45 AM on July 1. *Id*. ¶ 4-5. John Nolan, an officer with the Philadelphia Police Department, will testify to the condition of Ms. Vincent's mailbox when he arrived at 10:20 AM on July 1 indicating that someone broke into the mailbox. *Id*. ¶ 5. Boris Smirnoff ("Mr. Smirnoff"), a salesclerk at a liquor store in Bensalem, Pennsylvania, will testify that he cashed Ms. Vincent's check there on the evening of July 5, from an individual named Alex Lias, whom he later identified as Mr. Davis from a police lineup. *Id*. ¶ 5-6. Bruce Springstein, the boss at the radiator plant where Mr. Davis works, will testify that Mr. Davis punched in at the time clock at 12 PM on July 1 and then punched out at 5:30 PM. *Id*. ¶ 6.

Mr. Davis is the only witness who can testify that the suspicious noises that Ms. Vincent heard at approximately 8:30 or 9 AM on July 1 came from his injured dog after the dog got hurt on their walk, the only one who can testify why he did not go to work by 8 AM on July 1 like he usually does but instead punched in at 12 PM, and the only witness who can testify to the encounter he had with Ms. Vincent at 6 PM on July 1 so as to refute his alleged suspicious behavior. *Id*. ¶ 3-4. Mr. Davis is also the only one who can refute that he tampered with the mailbox on July 1. *Id*. ¶ 5. Lastly, Mr. Davis is the only witness who can testify that he has never been to the liquor store in Bensalem where Ms. Vincent's check was cashed by Mr. Smirnoff on July 5, that he was at home alone that evening, and that nothing happened on July 5 which would give him a reason to specifically recall it. *Id*. ¶ 7. As Mr. Davis cannot establish the subject matter of his testimony by other means, his testimony is even more necessary "to refute strong prosecution evidence." *Caldwell*, 760 F.3d at 287-88. There is a greater need for Mr. Davis to testify on his own behalf to demonstrate the validity of his defense which weighs against the admission of the prior conviction. *Guerrier*, 511 F. Supp. 3d at 565.

D. The fourth Bedford factor weighs in favor of excluding the prior conviction.

The fourth and final Bedford factor concerns the significance of the defendant's credibility to the case. *Caldwell*, 760 F.3d at 288. "When the defendant's credibility is a central issue, this weighs in favor of admitting a prior conviction." *Id.*; s*ee United States v. Johnson*, 302 F.3d 139, 153 (3d Cir. 2002) (affirming the admission of a prior conviction under Rule 609(a) because the defendant's credibility was important); *United States v. Bianco*, 419 F. Supp. 507, 509 (E.D. Pa. 1976) (finding that evidence of defendant's prior convictions is relevant to attack the defendants' credibility). "Where a case is reduced to a swearing contest between witnesses, the probative value of conviction is increased." *Caldwell*, 760 F.3d at 288; *Johnson*, 302 F.3d at 152 (finding that credibility was a major issue at trial because defendant's defense depended on the jury believing his story rather than his co-defendant). Conversely, the probative value of a defendant's prior conviction may be diminished "where the witness testifies as to inconsequential matters or facts that are conclusively shown by other credible evidence." *Caldwell*, 760 F.3d at 288.

The testimony of Mr. Davis will create a "credibility contest between the defendant and the government's witnesses." *Guerrier*, 511 F. Supp. 3d at 565-66. At the preliminary examination, Mr. Smirnoff testified that Daniel Davis "looked like" the man who had presented Ms. Vincent's check under the name Alex Lias on July 5 and that Mr. Smirnoff "thought he [Mr. Davis] was the man." Davis Aff. ¶ 5. The testimony will create an issue as to whether Mr. Davis was properly identified by Mr. Smirnoff and whether Mr. Davis stole Ms. Vincent's Social Security check from her mailbox. *Guerrier*, 511 F. Supp. 3d at 566. The jury will have to decide between Mr. Davis's version of events and those provided by Mr. Smirnoff, Ms. Vincent, and the other government witnesses. *Jessamy*, 464 F. Supp. 3d at 677. In light of the choice the jury will have to make regarding credibility, Mr. Davis's conviction is likely admissible under this fourth factor.

However, the probative value of Mr. Davis's prior conviction is diminished because he plans on testifying to "inconsequential matters or facts" in support of his alibi defense "that are conclusively shown by other credible evidence." *Caldwell*, 760 F.3d at 288. Mr. Davis's alibi defense is that he had a medical emergency to take care of regarding his pet Doberman on the morning of July 1 that prevented him from being near the scene at the time when Ms. Vincent's check was stolen sometime before 10 AM when she went to check her mailbox. Davis Aff. ¶ 6. Mr. Davis plans on testifying to all of the inconsequential facts that informed his visit to the Germantown Veterinary Emergency Clinic: how his dog got hurt during their usual walk, what led Mr. Davis to seek out professional treatment, the search he conducted to find a veterinary clinic, the travel time it took to arrive at the clinic, the paperwork he had to complete, and the treatment his dog received at the clinic as well as the time that the entire process took. *Id*. ¶ 6-7. However, Mr. Davis has other witnesses and records from the Germantown Veterinary Emergency Clinic in support of his alibi defense. *Id*. ¶ 7. He has the clinic's business records showing that he brought an injured Doberman to the clinic and the dog was discharged at 10:50 AM that day. *Id*. The veterinary doctor and receptionist that day will testify that Mr. Davis was in the treatment room the entire time, the process of checking in takes a minimum of five minutes, and the suturing procedure performed by the doctor most probably would have taken longer than fifty minutes and as much as one hour and fifteen minutes. *Id*. Lastly, a licensed professional investigator who drove the six miles between Mr. Davis's apartment and the Germantown Veterinary Emergency Clinic has ascertained that the most reasonable estimate for a one-way trip given traffic conditions on a weekday morning is twenty minutes. *Id*. ¶ 8. If the procedure took an hour, the visit to the clinic from the time of discharge would have taken at a minimum an hour and twenty-five minutes, meaning he had to have left his apartment for the clinic at 9:25 AM the latest, which is before the

check was even delivered by Mr. Krantz, so Mr. Davis could not have stolen the Social Security check. *Id*. ¶ 4-5. Mr. Davis's credibility is an issue in the case which tends to weigh in favor of admitting his prior conviction. However, the inconsequential events Mr. Davis planned on testifying to in support of his alibi defense are conclusively proven by witnesses and records from the clinic, so the prior conviction loses its probative value, thus the credibility of the defendant weighs against admitting the prior conviction.

II. The court should declare defendant's prior conviction inadmissible as impeachment evidence under Rule 609(a)(2), in the event he chooses to testify at trial.

Pursuant to Rule 609(a)(2), "for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement." Fed. R. Evid. 609(a)(2). The Third Circuit has held "that a crime must involve expressive dishonesty to be admissible under Rule 609(a)(2)." *Walker*, 385 F.3d at 334. "The proper test for admissibility under Rule 609(a)(2) does not measure the severity or reprehensibility of the crime, but rather focuses on the witness's propensity for falsehood, deceit or deception." *Cree*, 969 F.2d at 38. Once the court "determines that a crime involves dishonesty or false statement, evidence of conviction of that crime *automatically* becomes admissible for impeachment purposes." *United States v. Hans*, 738 F.2d 88, 94 (3d Cir. 1984). In the present case, the operative question is whether a conviction for willfully injuring government property is a crime that involves dishonesty or false statement. Willfully injuring government property has no element that implies any form of falsehood or deception. *See* 18 U.S.C. § 1361. So, the prior conviction is inadmissible for impeachment purposes under 609(a)(2) for attacking Mr. Davis's credibility as the crime does not establish his propensity for deceit. Therefore, the *in limine* motion to exclude the defendant's prior conviction under Rule 609(a)(2) should be granted.

Applicant Details

First Name	**Benjamin**
Last Name	**Lehman**
Citizenship Status	**U. S. Citizen**
Email Address	**benjamle@umich.edu**
Address	**Address** Street **3085 Wolverine Drive** City **Ann Arbor** State/Territory **Michigan** Zip **48108**
Contact Phone Number	**734-395-0319**

Applicant Education

BA/BS From	**Cornell University**
Date of BA/BS	**May 2012**
JD/LLB From	**The University of Michigan Law School** **http://www.law.umich.edu/currentstudents/careerservices**
Date of JD/LLB	**May 3, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Michigan Journal of International Law**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Campbell Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Cruz Bridges, Angelita
Angelita.Bridges@usdoj.gov
419-259-6376
Halberstam, Daniel
dhalber@umich.edu
734-763-4408
Hershovitz, Scott
sahersh@umich.edu
734-763-4923

This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 08, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am a second-year law student at University of Michigan Law School, and I am writing to apply to clerk for you for the 2024-2025 term. I am interested in a federal district clerkship because after clerking, I hope to pursue a career as a government litigator, either as a federal prosecutor or on the civil side.

Prior to Law School, I worked in credit card analytics, first at Capital One, and then at Verisk Financial, an analytic consulting firm. I developed three critical skills in this work. First, I learned to tailor my presentations to the concerns and experience of my audience, adapting my material for internal technical audiences and senior executives at our clients. Second, I refined a meticulous attention to detail, because I was often the last layer of internal review before our recommendations were shared with our customers. Finally, I learned to pace myself and prioritize, working to meet my deadlines without burning out.

Developing my legal research and writing skills has been my top priority during my first two years at Michigan Law. Last Spring, I wrote a blog post for the Michigan Journal of Environmental and Administrative Law on the constitutional issues associated with agency delegation to private entities. During my Summer at the U.S. Attorney's Office, I continued to hone my legal skills, writing short memos for sentencing, opposing suppression of evidence, and defending expert testimony. In the Fall, I wrote an eighteen-page essay exploring how structural factors in governance have impeded effective regional transit in Southeast Michigan, as well as a Campbell Moot Court brief. During my Summer internship with the Department of Justice in their Tax Division, I expect to have the opportunity to develop substantive expertise, as well as to practice writing longer, more nuanced briefs.

In addition to the requested documents, I have included with my resume a letter explaining Michigan's class ranking policy.

Thank you for your consideration.
Sincerely,
Benjamin Lehman

Benjamin Lehman

3085 Wolverine Drive, Ann Arbor, MI 48108
734-395-0319 • benjamle@umich.edu
He/Him

EDUCATION

UNIVERSITY OF MICHIGAN LAW SCHOOL — Ann Arbor, MI
Juris Doctor 3.826 (historically top 10 %) — Expected May 2024
Journal: Managing Executive Editor, *Michigan Journal of International Law*
Honors: Certificate of Merit: Torts, Civil Procedure
Clinic: Child Advocacy Law Clinic
Activities: Treasurer, *Older Wiser Law Students*
Packet Design Team, *1L Oral Advocacy Competition*
Volunteer, *Clean Slate (Expungement) Project, Michigan Advocacy Program*

CORNELL UNIVERSITY — Ithaca, NY
Masters of Engineering in Systems Engineering — May 2013
Bachelor of Science in Civil and Environmental Engineering — May 2012
Activities: President, Ring of Steel Ithaca (Fight Choreography and Stunt Performance Troupe)
Treasurer, Risley Residential College

EXPERIENCE

DEPARTMENT OF JUSTICE, TAX DIVISION — Washington, DC
Summer Legal Intern (SLIP) — May -August 2023

UNITED STATES ATTORNEY'S OFFICE NORTHERN DISTRICT OF OHIO — Toledo, OH
Summer Legal Intern — June 2022-August 2022

- Drafted Sentencing Memos for a variety of criminal charges, including gun possession and child pornography
- Analyzed criminal history of Defendants for applicability of sentencing enhancements
- Wrote Motion to Dismiss in civil case about Rail Labor Act
- Researched and wrote responsive memoranda to Motions to Suppress and to Dismiss

VERISK ANALYTICS — White Plains, NY
Manager, Analytics — August 2018-August 2021

- Developed and presented new Powerpoint reports and analyses to help banking clients understand the impact of COVID on their partners and customers
- Scheduled team meetings and planned morale-boosting activities, both virtually and in-person
- Managed two junior associates, developing their technical, leadership, and presentational skills through practice presentations and monthly development check-ins

CAPITAL ONE FINANCIAL — Richmond, VA
Senior Data Analyst (Full Time) — August 2015-August 2018

- Coordinated shift of data to a new platform, understanding internal client needs and translating them into requirements for the tech teams to prevent any interruption in the work

Data Analyst (Full Time) — July 2013-August 2015

- Designed and created performance monitoring reports in Excel and Powerpoint for new Customer Management Products

ADDITIONAL

Languages: French (Moderate), German (Basic)
Interests: Political History, Strategy Games, Walking (5-10 miles)

MICHIGAN LAW
UNIVERSITY OF MICHIGAN

Rashida Y. Douglas
Registrar; Director
Office of Student Records, 300 Hutchins Hall
625 S. State Street, Ann Arbor, MI 48109-1215
Phone: 734.763.6499 | Fax: 734.936.1973
Email: lawrecords@umich.edu

Memo: 2018 - 2022 Class Ranking

To whom it may concern:

The University of Michigan Law School does not rank its current students; however, it does rank graduates upon completion of their degrees. As the GPAs that correspond to particular percentages do change slightly from year to year, we are providing averages for the graduating classes from the past five academic years (2018 - 2022). Thus, the following information may assist you in evaluating candidates:

-- Students with a cumulative GPA of 4.010 and above finished in the top 1%
-- Students with a cumulative GPA of 3.941 and above finished in the top 2%
-- Students with a cumulative GPA of 3.921 and above finished in the top 3%
-- Students with a cumulative GPA of 3.884 and above finished in the top 5%
-- Students with a cumulative GPA of 3.820 and above finished in the top 10%
-- Students with a cumulative GPA of 3.772 and above finished in the top 15%
-- Students with a cumulative GPA of 3.735 and above finished in the top 20%
-- Students with a cumulative GPA of 3.700 and above finished in the top 25%
-- Students with a cumulative GPA of 3.650 and above finished in the top 33%
-- Students with a cumulative GPA of 3.563 and above finished in the top 50%

During the Winter 2020 term, a global pandemic required significant changes to course delivery. All courses used mandatory Pass/Fail grading. Consequently, the students who graduated in the May 2020 term graduated with five semesters of graded courses, rather than six.

Rashida Y. Douglas
Law School Registrar & Director for the Office of Student Records

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Lehman,Benjamin
Student#: 82468771

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2021	**(August 30, 2021 To December 17, 2021)**							
LAW	510	003	Civil Procedure	Nicholas Bagley	4.00	4.00	4.00	A+
LAW	530	002	Criminal Law	Barbara Mcquade	4.00	4.00	4.00	A-
LAW	580	004	Torts	Scott Hershovitz	4.00	4.00	4.00	A+
LAW	593	011	Legal Practice Skills I	Nancy Vettorello	2.00		2.00	S
LAW	598	011	Legal Pract:Writing & Analysis	Nancy Vettorello	1.00		1.00	S
Term Total				**GPA: 4.100**	**15.00**	**12.00**	**15.00**	
Cumulative Total				**GPA: 4.100**		**12.00**	**15.00**	
Winter 2022	**(January 12, 2022 To May 05, 2022)**							
LAW	520	003	Contracts	Kristina Daugirdas	4.00	4.00	4.00	A-
LAW	540	003	Introduction to Constitutional Law	Don Herzog	4.00	4.00	4.00	B+
LAW	594	011	Legal Practice Skills II	Nancy Vettorello	2.00		2.00	S
LAW	797	001	Model Rules and Beyond	Bob Hirshon	3.00	3.00	3.00	A
Term Total				**GPA: 3.636**	**13.00**	**11.00**	**13.00**	
Cumulative Total				**GPA: 3.878**		**23.00**	**28.00**	

Continued next page >

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Lehman,Benjamin
Student#: 82468771

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2022	**(August 29, 2022 To December 16, 2022)**							
LAW	641	001	Crim Just: Invest&Police Prac	Eve Primus	4.00	4.00	4.00	B+
LAW	664	001	European Union Law	Daniel Halberstam	3.00	3.00	3.00	A
LAW	747	001	Taxation of Individual Income	Reuven Avi-Yonah	4.00	4.00	4.00	A-
LAW	805	001	Environmental Justice	Oday Salim	2.00	2.00	2.00	A
LAW	885	007	Mini-Seminar The Enduring Allure of Book Bans	Susan Page	1.00		1.00	S
LAW	900	393	Research	Patrick Barry	1.00		1.00	S
Term Total				**GPA: 3.692**	**15.00**	**13.00**	**15.00**	
Cumulative Total				**GPA: 3.811**		**36.00**	**43.00**	
Winter 2023	**(January 11, 2023 To May 04, 2023)**							
LAW	643	001	Crim Procedure: Bail to Post Conviction Review	Barbara Mcquade	3.00	3.00	3.00	A
LAW	669	002	Evidence	Len Niehoff	4.00	4.00	4.00	A-
LAW	886	007	Mini-Seminar II The Enduring Allure of Book Bans	Susan Page	0.00		0.00	S
LAW	910	001	Child Advocacy Clinic	Vivek Sankaran Frank Vandervort Joshua Kay	4.00		4.00	P
LAW	911	001	Child Advocacy Clinic Seminar	Vivek Sankaran Frank Vandervort Joshua Kay	3.00	3.00	3.00	A
Term Total				**GPA: 3.880**	**14.00**	**10.00**	**14.00**	
Cumulative Total				**GPA: 3.826**		**46.00**	**57.00**	

Continued next page >

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Lehman,Benjamin
Student#: 82468771

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2023	**(August 28, 2023 To December 15, 2023)**							
Elections as of:	06/06/2023							
LAW	453	001	Law and Philosophy Workshop	Ekow Yankah Sarah Moss	2.00			
LAW	657	001	Enterprise Organization	Nicholas Howson	4.00			
LAW	677	001	Federal Courts	Gil Seinfeld	4.00			
LAW	679	001	Environmental Law and Policy	Nina Mendelson	4.00			

End of Transcript
Total Number of Pages 3

This transcript is printed on special security paper with a blue background and the seal of the University of Michigan. A raised seal is not required.

A BLACK AND WHITE TRANSCRIPT IS NOT AN ORIGINAL

U.S. Department of Justice

United States Attorney
Northern District of Ohio

Four Seagate, Suite 308
Toledo, Ohio 43604-2624

March 10, 2023

Dear Judge:

It is my pleasure to provide my personal and professional recommendation for Benjamin Lehman ("Ben"). I worked closely with Ben as an intern at the United States Attorney's Office for the Northern District of Ohio from June 2022 until August 2022. During that time, Ben researched and drafted substantive arguments for several criminal motions and a civil motion to dismiss an administrative appeal filed against the National Railway Adjustment Board. His written work product is excellent.

Ben is the Managing Executive Editor of the University of Michigan Journal of International Law and received a Certificate of Merit in his Torts and Civil Procedure classes. Ben's writing skills were immediately apparent while working with him. He was thorough, thoughtful, and open to suggestions as we edited multiple drafts of the motion to dismiss. He was not afraid to ask questions and get additional guidance when needed, but also took the initiative on his own to pursue legal theories and bring them to my attention.

During his time with our office, Ben was exposed to a variety of criminal cases and civil cases in the areas of affirmative and defensive litigation on behalf of the government. I am confident the experience Ben gained as a summer intern with my office, along with his high GPA and clinic experience, would make him the best candidate for a clerkship.

I highly recommend Ben Lehman for a clerkship; he is a very good writer, a hard worker, and would make a great asset to any office. Please feel free to contact me with additional questions at Angelita.Bridges@usdoj.gov or 419-259-6376.

Respectfully,

Angelita Cruz Bridges
Assistant United States Attorney

UNIVERSITY OF MICHIGAN LAW SCHOOL
625 South State Street
Ann Arbor, Michigan 48109-1215

Daniel H. Halberstam
Eric Stein Collegiate Professor of Law
Director, European Legal Studies

June 08, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am delighted to write in support of Benjamin Lehman, who has applied for a clerkship in your chambers. Ben is an extraordinarily sharp young lawyer with a quick analytic mind. I have no doubt he will make an excellent clerk in whatever chambers he joins.

Ben was a student in my EU class, in which we cover the constitutional structure, basic rights, and several foundational statutory provisions (such as core anti-discrimination laws) of the European Union. Our conversation often winds up being comparative, allowing students to draw on their existing knowledge of the corresponding law of the United States.

Ben stood out in our class conversations with his perceptive analysis of cases, demonstrating an extraordinary and at times astounding grasp of the material. Although he did not dominate the conversation, Ben was perhaps the single best discussant of the materials in class – indeed among the best I have seen in several years. Ben would quickly follow through obscure legal arguments, and easily recognize evasive maneuvers along the way. His spot-on critique would often make me smile.

Ben's understanding of the materials carried through on the exam, where he wrote one of the top two submissions. His writing was consistently clear, identifying hidden issues, and providing persuasive analysis of the various problems. He easily earned an A for his performance in the course.

In temperament, Ben is a rather soft-spoken person who brightens up when rigorously discussing challenging materials. He would be excellent not only at producing the written work needed from a clerk, but also at talking through the various legal arguments of a given case with his colleagues. He will surely be an asset to the chambers he joins.

In summary, I recommend Ben to you most highly and without qualification. Please do not hesitate to reach out with any questions you may have.

Yours Sincerely,

Daniel H. Halberstam

Daniel Halberstam - dhalber@umich.edu - 734-763-4408

UNIVERSITY OF MICHIGAN LAW SCHOOL
625 South State Street
Ann Arbor, Michigan 48109-1215

Scott A. Hershovitz
Thomas G. and Mabel Long Professor of Law
Professor of Philosophy
Director, Law and Ethics Program

June 08, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing in support of Benjamin Lehman's application to clerk in your chambers. Ben is an exceptional law student. He's smart, curious, and he works hard. He'll be a terrific clerk.

Lehman took my 1L torts class. And it was clear from the start that he was the top student in the class. He was sharp every time I called on him. But more than that, he asked sharp questions—questions that showed he had mastered the material and was thinking creatively about it. On a few occasions, his questions pushed my understanding of the law, and I had to consult with colleagues to find answers. I've been teaching torts for fifteen years. That doesn't happen often.

Lehman crushed the exam. He had the top score on all three sections. His raw grade was a 97; the second-highest grade was a distant 87. I can't remember a gap that large. As you might expect given that performance, his answers were exceptionally well-written. He offered a detailed analysis of every question, which aside from small details, could have served as an answer key. Indeed, I distributed Lehman's answers to students who wanted to review their exams; it was that well done.

Lehman earned an A+ in the course, of two on his transcript that semester. And he's done very well (though not quite that well) in subsequent semesters. Everything I've seen, in person and on Lehman's transcript, gives me confidence that he's got the tools to be an absolutely first-rate clerk.

Lehman is also friendly and unassuming. He's soft-spoken. He came to law school a little later than most, and approaches his work with the maturity of someone who's used to working. He'll be a delight to have in chamber, and he'll knock any assignment you give him out of the park.

If I was a judge, I'd hire Lehman in a heartbeat. I recommend him strongly.

Sincerely,

Scott A. Hershovitz

Scott Hershovitz - sahersh@umich.edu - 734-763-4923

Benjamin Lehman

3085 Wolverine Drive, Ann Arbor, MI 48108
734-395-0319 • benjamle@umich.edu

This writing sample is my portion of my first round brief for the 2022-2023 Campbell Moot Court Competition. The question we were assigned to argue was the constitutionality of Administrative Law Judges assessing punitive damages, both under the 7th Amendment and as a potential infringement of executive power. My partner wrote the 7th Amendment section, while I wrote the bulk of the introduction and conclusion, as well as the executive power section. I have removed my partner's sections, so the attached work is entirely my own and has not been edited based on feedback from anyone else, including my partner.

IN THE

Supreme Court of the United States

No. 22-0096

H. B. SUTHERLAND BANK, N.A.,
Petitioner,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

BRIEF FOR RESPONDENT

24
Counsel of Record

STATEMENT OF THE CASE

A. Introduction

Petitioner Sutherland Bank (hereinafter "Petitioner") is appealing from an unfavorable 2021 Final Order in a Consumer Finance Protection Bureau (CFPB) adjudication proceeding. H. B. Sutherland Bank, N.A. v. CFPB, 505 F.4th 1, 2 (12th Cir. 2022). In support of its appeal, Petitioner puts forward two arguments. First, Petitioner argues that the damages and penalties assessed against it violated its Seventh Amendment right to a jury trial. U.S. Const. amend. VII Second, it alleges that the Bureau's use of an Administrative Law Judge (ALJ) to conduct the initial proceedings and render a Recommended Decision violates the constitutional mandate that the President take care that the laws be faithfully executed. U.S. Const. art. II § 3, cl.4. It claims that the ALJ is impermissibly insulated by two layers of for-cause removal, similar to the Oversight Board that the Court rejected in Free Enterprise Fund. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010).

Both of Petitioner's claims must fail. [My partner's summary of her argument on the Seventh Amendment claim was here]. The second claim also fails for three reasons. First, ALJs do not wield *executive* power, which is the type that implicates the President's ability to fulfill his mandate. Free Enter. Fund, 561 U.S. at 495. Second, the ALJ in the CFPB makes no final decisions, but "possesses purely recommendatory powers", a reason the Court explicitly gave for not extending its decision to ALJs in Free Enterprise Fund. Free Enter. Fund, 561 U.S. at 507, n.10. Lastly, the ALJ at issue in this case is not actually insulated by two layers of for-cause removal, but only one, like the Independent Counsel structure that this Court upheld in Morrison v. Olson. Morrison v. Olson, 487 U.S. 654, 686 (1988).

Since 1946, ALJs have performed their adjudicatory function subject only to removal for "good cause". Administrative Procedure Act of 1946 Pub. L. No. 79-404 §11. The current structure

of review by the Merit Systems Protection Board (MSPB) dates to 1978. Civil Service Reform Act of 1978. Pub. L. No. 95-454 §202. Petitioner asks this Court to drastically restructure the entire adjudicative process and overturn a system that has delivered efficient, impartial results for over forty years. In contrast, Respondent requests simply that this Court reaffirm the distinction that it identified in Free Enterprise Fund between policy-making executive officers and adjudicatory officials. By doing so, this Court will maintain the administrability of the regulatory system.

B. Statement of Facts

Petitioner is a nationwide bank, providing retail banking and other financial services to over 11 million customers. Sutherland, 505 F.4th at 2-3. Petitioner advertised their accounts as having no fees and told customers they were not being assessed fees. Id. at 5. However, all accounts were enrolled in Petitioner's APP service, which assesses fees for any overdraft. Id. Petitioner continued to advertise their accounts as no-fee for more than two years after the first consumer complaint about overdraft fees. Id.

In 2019, the CFPB initiated proceedings against Petitioner claiming that Petitioner's conduct violated the Electronic Fund Transfer Act (EFTA), 15 U.S.C. §§ 1693-1693r, the Consumer Finance Protection Act (CFPA), 12 U.S.C. §§ 5531(a), (d)(1), 5536(a)(1)(B), and the Fair Credit Reporting Act (FCRA) 15 U.S.C. §§ 1681-1681x. Id. at 4. Following Oral Arguments, the ALJ issued a Recommended Decision finding for the Bureau on all counts, recommending that Petitioner be held liable for over eight million dollars of damages to consumers for its violations, as well as that it be assessed civil penalties. Id. In 2020, the Thandiwe Pierson, the Director of the CFPB, issued a Final Decision, confirming the ALJ's ruling. Id. at 5.

C. Procedural History

Petitioner has consistently alleged that the CFPB violated its Seventh Amendment right to a jury trial. Id. at 2. Petitioner also claims that the Bureau's structure, under which ALJs may only

be removed for cause by a board whose members are also only removable for cause, prevents the President from taking care that the laws be faithfully executed and is therefore unconstitutional. Id. Following Director Pierson's decision, Petitioner filed a motion with the Director for a stay on the Final Order and Decision, which was denied. Id. at 5. Petitioner filed a timely petition with the 12th Circuit to set aside the Final Order and Decision. A divided panel ruled in favor of the Bureau on both counts. Id. at 5-6. Petitioner was granted a rehearing en banc by the full Circuit Court. Id. at 6. The full 12th Circuit also rejected both of Petitioner's Constitutional claims in August of 2022. Petitioner then filed a petition for writ of certiorari to the Supreme Court of the United States, which was granted.

DISCUSSION

I. CFPB ADMINISTRATIVE LAW JUDGES' FOR-CAUSE REMOVAL PROTECTIONS DO NOT IMPINGE ON THE PRESIDENT'S CAPACITY TO CONTROL THE EXECUTIVE AUTHORITY

The Supreme Court has determined that ALJs are "inferior officers" for the purposes of Article II, Section 2 of the Constitution. Lucia v. SEC, 138 S. Ct. 2044, 2049 (2018). Under the terms of the Appointments Clause, Congress may "vest the Appointment of such inferior Officers" in, among other positions "the Courts of Law." U.S. Const. art. II § 2, cl. 2. The Constitution thus is open to inferior officers being appointed by parties outside of the executive branch, and it is in that context that the CFPB's removal system should be analyzed.

The Supreme Court has established that a "'good cause' standard for removal by itself" does not unduly impinge on executive authority. Morrison v. Olson, 487 U.S. 654, 691 (1988); U.S. v. Perkins, 116 U.S. 483, 485 (1886). In Free Enterprise Fund, however, the Supreme Court held that two levels of protected tenure could not separate "the President from an officer exercising executive power." Free Enter. Fund, 561 U.S. at 495. This ruling does not apply and should not be extended to the ALJ in this case for three reasons. First, ALJs as a general matter wield

adjudicatory power, not executive or policy-making power. Second, the ALJ in the CFPB does not exercise any kind of final decision-making power. Finally, while the establishment of good cause is determined by an independent body, the decision to remove a CFPB ALJ for cause is vested in the Commissioner, who is removable at will, so there is only one layer of good-cause removal in the system at issue.

A. Administrative Law Judges Perform an Adjudicatory, not Executive or Policy-Making Role

ALJs are fundamentally different from other executive branch officers. In contrast to the Board that was at issue in Free Enterprise Fund, ALJs neither create new rules nor do they enforce existing ones. Free Enter. Fund, 561 U.S. at 486. They "cannot initiate investigations or commence a … case." Decker Coal Co. v. Pehringer, 8 F.4th 1123, 1133 (9th Cir. 2021). Rather, they "perform only adjudicative functions" as then-judge Kavanaugh described in his dissent when Free Enterprise Fund was before the D.C. Circuit. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 537 F.3d 667, 699 n. 8 (D.C. Cir. 2008) (Kavanaugh J., dissenting) aff'd in part, rev'd in part and remanded, 561 U.S. 477 (2010); see also Sutherland, 505 F. 4th at 17. It is for these reasons that the Court explicitly held stated that the holding in Free Enterprise Fund "does not address …administrative law judges." Free Enter. Fund, 561 U.S. at 507 n.10.

Because ALJs are supposed to serve as "impartial adjudicators", insulating them from excessive interference by political actors is critical to maintaining the "actual and perceived integrity of [their] proceedings." Sutherland, 505 F.4th at 17; cf. Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 758 (2002) (stating that "the role of the ALJ, the impartial officer designated to hear a case … is similar to that of an Article III judge.")

B. Even if some ALJs Perform an Executive Function, the CFPB ALJ Does Not Make Final Decisions, and Therefore Does Not Wield Substantial Executive Authority

The ALJs in the CFPB do not make any final decisions. Rather, they simply produce a "Recommended Decision." Petitioner in this case did file an appeal of the decision to the Director, but §1081.402 provides that even in the absence of such an appeal the Director of the CFPB will "either issue a final decision and order … , or order further briefing." 12 C.F.R. §1081.402 (2022). As Judge Kavanaugh noted, "it is logical to assume that even *for-cause* executive officers …still might be considered 'directed and supervised' if a superior other than the President has statutory authority to prevent and affirmatively command … all significant exercises of executive authority by the officer." Free Enter. Fund, 537 F.3d at 708. Since every decision made by the ALJ must be reviewed by the Director, who has full discretion to modify it, the ALJ wields no actual executive or policy-making power. This is in sharp contrast to "committing substantial executive authority" to an officer, which is what the Court struck down in Free Enterprise Fund. Free Enter. Fund,561 U.S. at 505.

The ability of the CFPB Director to perform the analysis "as if the Director had made the preliminary findings and conclusions, i.e. de novo" contrasts with the authority of the reviewing authorities in other contexts. Sutherland, 505 F.4th at 17 (internal quotations omitted). The Department of Labor's Benefits Review Boards (BRBs), who, like the CFPB director, are removable at will, "cannot reweigh the evidence" from hearings performed by ALJs, only reviewing findings of fact for "substantial evidence." Decker Coal Co., 8 F.4th at 1134. None the less, the Ninth Circuit has upheld the identical structure of ALJs subject to for-cause removal by the same protected Merit Systems Protection Board (MSPB). They did so because "ALJs are judges who make decisions that are subject to vacatur by people without tenure protection." Decker

Coal Co., 8 F.4th at 1135. The ALJ in the CFPB makes decisions that are not only subject to vacatur, but to full "de novo" review.

C. The CFPB ALJ is Only Behind One Layer of Good-Cause Removal

In Free Enterprise Fund, the Court contrasted the Attorney General as "an officer directly responsible to the president" with the Commissioners, "none of whom is subject to the President's direct control." Free Enter. Fund, 561 U.S. at 495. Like the Attorney General, the CFPB Director is directly responsible to the president and "removable at will". Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2192 (2020). Like the Attorney General in Morrison, the Director of the CFPB "retains the power to remove the counsel for 'good cause,'" Morrison, 487 U.S. at 696. This contrasts with the situation the 5th Circuit faced in Jarkesy, where the SEC Commissioners who could remove the ALJ for good cause were themselves only removable for cause. Jarkesy v. SEC, 34 F.4th 446, 464 (5th Cir. 2022). The Merit Systems Protection Board (MSPB) is responsible for determining if good cause exists for taking action against an ALJ, but it is "the agency in which the administrative law judge is employed" that takes the action. 5 U.S.C. § 7521(a). It is the Director's decision, not the MSPB, whether to take action against the ALJ. The MSPB functions as an adjudicatory review board, similar to the District Court for the District of Columbia in the structure approved in Morrison. Morrison, 487 U.S. at 663. In short, because the ALJ "may be terminated for 'good cause', the Executive", through the Director, "retains ample authority" to assure that the ALJ "is competently performing his or her statutory responsibilities." Morrison, 487 U.S. at 692.

§ 7521 moves the finding of cause by an independent panel to before the agency action rather than leaving it for after-the-fact review, but this does not change the fundamental structure. In both Morrison and this case, an executive official, removable at will, may choose to terminate the inferior officer for good cause, subject to review by an independent authority. The president has more authority over the MSPB than the Article III court that performed the review in Morrison,

so this process impinges on the President's power to enforce the laws less than the Independent Counsel there. Furthermore, as discussed above, the ALJ performs a less quintessentially executive function than the Special Counsel did.

CONCLUSION

Petitioner asks this Court to dismantle a core part of our nation's regulatory apparatuses. Respondent, however, merely asks the Court to confirm two simple legal standards. First, that the Seventh Amendment right to a jury trial is not implicated by the CFPB's assessment of civil penalties. Second, that the ALJ in the CFPB is not shielded by a dual layer good-cause removal system in a way that impermissibly curtails the President's capacity to execute the laws of this country. We therefore respectfully request the Court to affirm the holding below and maintain the effective and administrable balance the democratic branches have established.

Applicant Details

First Name	**Josh**
Middle Initial	**J.**
Last Name	**Leopold**
Citizenship Status	**U. S. Citizen**
Email Address	**jleopold@uchicago.edu**
Address	**Address** Street **5105 S. Harper Ave., Apt. 610** City **Chicago** State/Territory **Illinois** Zip **60615** Country **United States**
Contact Phone Number	**9737693883**

Applicant Education

BA/BS From	**Washington University in St. Louis**
Date of BA/BS	**June 2019**
JD/LLB From	**The University of Chicago Law School** **https://www.law.uchicago.edu/**
Date of JD/LLB	**June 1, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**The University of Chicago Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Stone, Geof
gstone@uchicago.edu
Morse, Michael
michaelmorse@uchicago.edu
Strahilevitz, Lior
lior@uchicago.edu
773-834-8665

This applicant has certified that all data entered in this profile and any application documents are true and correct.

JOSH J. LEOPOLD
5105 South Harper Avenue, Chicago, IL 60615
jleopold@uchicago.edu | (973) 769-3883

June 12, 2023

The Honorable Juan R. Sanchez
United States District Court for the Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Chief Judge Sanchez,

I am a rising third-year law student at the University of Chicago Law School and Articles Editor of the *University of Chicago Law Review* writing to apply for a clerkship in your chambers for the 2024 term. My interest in clerking is driven by my passion for public service and a desire to work on issues at the forefront of the law. Serving as a clerk in Philadelphia would hold a special significance for me as my brother and sister-in-law live in the city.

Through my academic and professional experiences, I have cultivated an exemplary work ethic and a commitment to clear and concise communication, qualities that I believe would be valuable in your chambers. For two years, I worked as an Investigations Paralegal in the Manhattan District Attorney's Office. There, I honed the ability to distill complex information and data into concise reports. During a summer position with the Appeals Division of the Missouri State Public Defender, I sharpened my legal writing skills and gained invaluable exposure to appellate advocacy. As Articles Editor of the *Law Review*, I have developed a knack for efficiently delving into unfamiliar legal concepts, synthesizing information, and discerning the merits of different perspectives. Finally, I have demonstrated my writing abilities by earning one of the highest grades in Legal Writing and by publishing both an Online Essay and a forthcoming Comment in the *Law Review*.

It would be a privilege to bring my passion, skills, and dedication to your chambers. Enclosed please find my resume, law school transcript, and writing sample for your review. Letters of recommendation from Professors Lior Strahilevitz, Geoffrey Stone, and Michael Morse will arrive separately. I welcome the opportunity to discuss my qualifications further and would be delighted to provide any additional information to support my candidacy.

Thank you for your time and consideration.

Sincerely,

Josh J. Leopold

Josh J. Leopold

JOSH J. LEOPOLD
5105 South Harper Avenue, Chicago, IL 60615
jleopold@uchicago.edu | (973) 769-3883

EDUCATION

The University of Chicago Law School, Chicago, IL
Juris Doctor, Expected June 2024

- *Journal*: *The University of Chicago Law Review*, Articles Editor
- *Publications*: Essay, *Examining Causation Standards in False Claims Act Cases*, U. CHI. L. REV. ONLINE (2023); Comment, *Searching for Standing: Are Improper Acquisition or Threatened Misappropriation of Trade Secrets Cognizable Injuries Sufficient for Article III Standing?*, 91 U. CHI. L. REV. (forthcoming 2023)
- *Activities*: Employment Law Society, 2L Representative; American Constitution Society, Programming Director; Jewish Law Students Association, Member; Research Assistant to Professor Jonathan Masur (summer 2023)

Washington University in St. Louis, St. Louis, MO
Bachelor of Arts: Double major in Philosophy and English with a minor in Religion & Politics, May 2019

- *Honors & Awards*: Sigma Tau Delta English Honor Society, President; First Place Essay Award, 2019 International English Honor Society Convention; Leab Exhibition Notable Citation Award from the American Library Association

EXPERIENCE

Gibson Dunn & Crutcher, New York, NY
Summer Associate, Summer 2023

Employment Law Clinic, Chicago, IL
Clinic Student, September 2022–June 2023

- Authored two settlement demand letters that led to successful settlement for allegations involving ADEA violations
- Assisted with amicus brief on the proper interpretation of Illinois' Biometric Information Privacy Act (BIPA)

Missouri State Public Defender: Appeals Division, St. Louis, MO
Legal Intern, June 2022–August 2022

- Authored a brief on ineffective assistance of counsel for submission to the Missouri Court of Appeals
- Wrote several research memos, including one on the application of double jeopardy to a capital punishment sentence
- Composed two motions, including one requesting acceptance of an untimely *pro se* motion under a common law exception

Manhattan District Attorney's Office: Public Corruption Unit, New York, NY
Investigations Paralegal, June 2019–June 2021

- Worked with ADAs and detectives to investigate corruption perpetrated by public officials and uniformed officers
- Contributed to investigations that led to the prosecution of a CEO who committed charity fraud, a uniformed officer who brutalized a homeless man, and a high-ranking member of the NYPD who forged paperwork
- Assisted ADAs with witness interviews by formulating questions, writing notes, and comparing statements
- Gathered and analyzed surveillance video and audio, license plate reader data, cell site data, and bank records
- Wrote subpoenas to request relevant data from banks, hospitals, city agencies, and public companies
- Acted as the lead Paralegal on the Unit's most document-intensive case, with several terabytes of ESI
- Completed intensive certification courses conducted by FinCEN and the National White Collar Crime Center

The John C. Danforth Journal of Religion and Politics, St. Louis, MO
Editorial Intern, August 2016–May 2019

- Fact-checked and cite-checked article submissions from academics and journalists to ensure accuracy and clarity
- Authored over 650 abstracts on editorials, magazine articles, and websites to provide content previews for readers
- Interviewed a former presidential speechwriter and a former Special Assistant to the President for my article, "*Religion and Polarized Politics: An Interview with Melissa Rogers and Peter Wehner*"

COMMUNITY SERVICE

Prison Education Project, St. Louis, MO
Research Assistant, January 2019–May 2019

- Helped inmates working on their associate degrees gather and interpret sources for their class papers

INTERESTS

- Pickleball, trail running, scale model building, watching NBA and NFL games

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THE UNIVERSITY OF CHICAGO
Office of the University Registrar
Chicago, Illinois 60637

Name: Joshua Jack Leopold
Student ID: 12329073

Scott C. Campbell, University Registrar

University of Chicago Law School

Academic Program History

Program: Law School
Start Quarter: Autumn 2021
Program Status:Active in Program
J.D. in Law

External Education

Washington University in St. Louis
Saint Louis, Missouri
Bachelor of Arts 2019

Beginning of Law School Record

Autumn 2021

Course		Description	Attempted	Earned	Grade
LAWS	30101	Elements of the Law Lior Strahilevitz	3	3	179
LAWS	30211	Civil Procedure Emily Buss	4	4	178
LAWS	30611	Torts Saul Levmore	4	4	183
LAWS	30711	Legal Research and Writing Michael Morse	1	1	183

Winter 2022

Course		Description	Attempted	Earned	Grade
LAWS	30311	Criminal Law Sonja Starr	4	4	182
LAWS	30411	Property Lee Fennell	4	4	177
LAWS	30511	Contracts Eric Posner	4	4	176
LAWS	30711	Legal Research and Writing Michael Morse	1	1	183

Spring 2022

Course		Description	Attempted	Earned	Grade
LAWS	30712	Legal Research, Writing, and Advocacy Michael Morse	2	2	183
LAWS	30713	Transactional Lawyering Douglas Baird	3	3	178
LAWS	40301	Constitutional Law III: Equal Protection and Substantive Due Process Aziz Huq	3	3	176
LAWS	42301	Business Organizations Saul Levmore	3	3	180
LAWS	44201	Legislation and Statutory Interpretation Ryan Doerfler	3	3	176

Summer 2022

Honors/Awards
The University of Chicago Law Review, Staff Member 2022-23

Autumn 2022

Course		Description	Attempted	Earned	Grade
LAWS	41601	Evidence Geoffrey Stone	3	3	179
LAWS	43224	Admiralty Law Randall Schmidt	3	3	177
LAWS	53445	Advanced Criminal Law: Evolving Doctrines in White Collar Litigation Thomas Kirsch	3	3	181
LAWS	90216	Employment Law Clinic Randall Schmidt	1	0	
LAWS	94110	The University of Chicago Law Review Anthony Casey	1	1	P

Winter 2023

Course		Description	Attempted	Earned	Grade
LAWS	40101	Constitutional Law I: Governmental Structure David A Strauss	3	3	179
LAWS	50202	Constitutional Decisionmaking Geoffrey Stone	3	3	181
LAWS	53130	Trade Secrets and Restrictive Covenants Brian Sieve Michael Slade	3	0	
LAWS	90216	Employment Law Clinic Randall Schmidt	1	0	
LAWS	94110	The University of Chicago Law Review Anthony Casey	1	1	P

Spring 2023

Course		Description	Attempted	Earned	Grade
LAWS	43203	Advanced Issues in Delaware Corporate Law William Chandler Lori Will	1	1	181
LAWS	43218	Public Choice and Law Saul Levmore	3	3	177
LAWS	43251	Advanced Legal Writing Elizabeth Duquette	2	2	178
LAWS	53472	Advanced Topics in Law and Computing Lior Strahilevitz Aloni Cohen	3	3	181
LAWS	90216	Employment Law Clinic Randall Schmidt	1	0	
LAWS	94110	The University of Chicago Law Review	1	1	P
Req Designation:		Meets Substantial Research Paper Requirement Anthony Casey			

Send To: Josh Leopold
5105 S Harper Ave
Chicago, IL
60615

Date Issued: 06/09/2023

Page 1 of 2

KEY TO TRANSCRIPT ON FINAL PAGE

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THE UNIVERSITY OF CHICAGO
Office of the University Registrar
Chicago, Illinois 60637

Name: Joshua Jack Leopold
Student ID: 12329073

Scott C. Campbell, University Registrar

University of Chicago Law School

End of University of Chicago Law School

Date Issued: 06/09/2023

KEY TO TRANSCRIPT ON FINAL PAGE

OFFICIAL ACADEMIC DOCUMENT

THE UNIVERSITY OF CHICAGO

Key to Transcripts of Academic Records

1. Accreditation: The University of Chicago is accredited by the Higher Learning Commission of the North Central Association of Colleges and Schools. For information regarding accreditation, approval or licensure from individual academic programs, visit http://csl.uchicago.edu/policies/disclosures.

2. Calendar & Status: The University calendar is on the quarter system. Full-time quarterly registration in the College is for three or four units and in the divisions and schools for three units. For exceptions, see 7 Doctoral Residence Status.

3. Course Information: Generally, courses numbered from 10000 to 29999 are courses designed to meet requirements for baccalaureate degrees. Courses with numbers beginning with 30000 and above meet requirements for higher degrees.

4. Credits: The Unit is the measure of credit at the University of Chicago. One full Unit (100) is equivalent to 3 1/3 semester hours or 5 quarter hours. Courses of greater or lesser value (150, 050) carry proportionately more or fewer semester or quarter hours of credit. See 8 for Law School measure of credit.

5. Grading Systems:

Quality Grades

Grade	College & Graduate	Business	Law
A+	4.0	4.33	
A	4.0	4.0	186-180
A-	3.7	3.67	
B+	3.3	3.33	
B	3.0	3.0	179-174
B-	2.7	2.67	
C+	2.3	2.33	
C	2.0	2.0	173-168
C-	1.7	1.67	
D+	1.3	1.33	
D	1	1	167-160
F	0	0	159-155

Non-Quality Grades

I	**Incomplete:** Not yet submitted all evidence for final grade. Where the mark I is changed to a quality grade, the change is reflected by a quality grade following the mark I, (e.g. IA or IB).
IP	**Pass** (non-Law): Mark of I changed to P (Pass). See 8 for Law IP notation.
NGR	**No Grade Reported:** No final grade submitted
P	**Pass:** Sufficient evidence to receive a passing grade. May be the only grade given in some courses.
Q	**Query:** No final grade submitted (College only)
R	**Registered:** Registered to audit the course
S	**Satisfactory**
U	**Unsatisfactory**
UW	**Unofficial Withdrawal**
W	**Withdrawal:** Does not affect GPA calculation
WP	**Withdrawal Passing:** Does not affect GPA calculation
WF	**Withdrawal Failing:** Does not affect GPA calculation
	Blank: If no grade is reported after a course, none was available at the time the transcript was prepared.

Examination Grades

H	Honors Quality
P*	High Pass
P	Pass

Grade Point Average: Cumulative G.P.A. is calculated by dividing total quality points earned by quality hours attempted. For details visit the Office of the University Registrar website: http://registrar.uchicago.edu.

6. Academic Status and Program of Study: The quarterly entries on students' records include academic statuses and programs of study. The Program of Study in which students are enrolled is listed along with the quarter they commenced enrollment at the beginning of the transcript or chronologically by quarter. The definition of academic statuses follows:

7. Doctoral Residence Status: Effective Summer 2016, the academic records of students in programs leading to the degree of Doctor of Philosophy reflect a single doctoral registration status referred to by the year of study (e.g. D01, D02, D03). Students entering a PhD program Summer 2016 or later will be subject to a University-wide 9-year limit on registration. Students who entered a PhD program prior to Summer 2016 will continue to be allowed to register for up to 12 years from matriculation.

Scholastic Residence: the first two years of study beyond the baccalaureate degree. (Revised Summer 2000 to include the first four years of doctoral study. Discontinued Summer 2016)
Research Residence: the third and fourth years of doctoral study beyond the baccalaureate degree. (Discontinued Summer 2000.)
Advanced Residence: the period of registration following completion of Scholastic and Research Residence until the Doctor of Philosophy is awarded. (Revised in Summer 2000 to be limited to 10 years following admission for the School of Social Service Administration doctoral program and 12 years following admission to all other doctoral programs. Discontinued Summer 2016.)
Active File Status: a student in Advanced Residence status who makes no use of University facilities other than the Library may be placed in an Active File with the University. (Discontinued Summer 2000.)
Doctoral Leave of Absence: the period during which a student suspends work toward the Ph.D. and expects to resume work following a maximum of one academic year.
Extended Residence: the period following the conclusion of Advanced Residence. (Discontinued Summer 2013.)

Doctoral students are considered full-time students except when enrolled in Active File or Extended Residence status, or when permitted to complete the Doctoral Residence requirement on a half-time basis.

Students whose doctoral research requires residence away from the University register *Pro Forma*. *Pro Forma* registration does not exempt a student from any other residence requirements but suspends the requirement for the period of the absence. Time enrolled Pro Forma does not extend the maximum year limit on registration.

8. Law School Transcript Key: The credit hour is the measure of credit at the Law School. University courses of 100 Units not taught through the Law School are comparable to 3 credit hours at the Law School, unless otherwise specified.

The frequency of honors in a typical graduating class:

Highest Honors (182+)
0.5%
High Honors (180.5+)(pre-2002 180+)
7.2%
Honors (179+)(pre-2002 178+)
22.7%

Pass/Fail and letter grades are awarded primarily for non-law courses. Non-law grades are not calculated into the law GPA.

P** indicates that a student has successfully completed the course but technical difficulties, not attributable to the student, interfered with the grading process.

IP (In Progress) indicates that a grade was not available at the time the transcript was printed.

* next to a course title indicates fulfillment of one of two substantial writing requirements. (Discontinued for Spring 2011 graduating class.)

See 5 for Law School grading system.

9. FERPA Re-Disclosure Notice: In accordance with U.S.C. 438(6)(4)(8)(The Family Educational Rights and Privacy Act of 1974) you are hereby notified that this information is provided upon the condition that you, your agents or employees, will not permit any other party access to this record without consent of the student.

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University of Chicago
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Chicago, IL 60637
773.702.7891

For an online version including updates to this information, visit the Office of the University Registrar website:
http://registrar.uchicago.edu.

Revised 09/2016

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Professor Geoffrey R. Stone
Edward H. Levi Distinguished Service
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June 09, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing on behalf of my student, Josh Leopold, who is applying for a clerkship with you beginning in 2024

Josh, who is now finishing his second-year, is a terrific candidate for a clerkship. Indeed, if I were a judge, I would definitely hire him myself.

Before law school, Josh worked for two years for the Manhattan District Attorney's Office of Public Corruption. We've had several conversations about that experience and he clearly found it to be both demanding and fascinating. Although he was already very interested in law school, that experience closed the deal for him.

During his time in law school, Josh has been truly excellent. His current grade point average places him well within the top 10% of his class. Beyond that, though, he now serves as Articles Editor of The University of Chicago Law Review and he has written a terrific Comment on his own. Moreover, as a member of the American Constitution Society Josh has worked hard – and very successfully – to create a broad range of joint events with the Federalist Society. His view, which I very much admire at this time of often sharp student division across ideologies, has been amazingly successful in bringing together often sharply different perspectives on a broad range of constitutional issues. He has inspired a true spirit of listening to and learning from the "other" side. He has been a true hero in achieving this. It truly captures his own intellectual approach to the law.

Josh has thus far been a student in two of my courses – Evidence and Constitutional Decision Making. The more relevant of the two is the seminar in Constitutional Decision Making. After serving as a law clerk both on the D.C. Court of Appeals and the Supreme Court, I very much wanted to share with my students the challenges of deciding difficult cases, working things out with colleagues, and then writing opinions that are both as persuasive and respectful as possible.

I first offered this seminar in 1973 when I joined the faculty. In brief, it works as follows: Students sign-up for the seminar in "courts" of five. Typically, each year I allow three courts to participate in the seminar. They work independently of each other.

Each week I give each court two cases they must decide, with opinions – majority, plurality, concurring and dissenting – depending on how the five justices vote. The catch is that they cannot rely on any real Supreme Court decisions, but each of their own prior decisions must be dealt with as a relevant precedent. Over the course of the seminar, each court decides sixteen cases. This year I focused on Equal Protection issues using hypothetical cases from 1875 to the present. To give you a sense of how demanding the seminar is, Josh's Court produced 360 single-spaced opinions.

Josh received the highest grade in the seminar this year. His work was terrific. He is a rigorous thinker, an excellent writer, and a thoughtful person. He, his fellow "judges," and I had frequent discussions about their prior decisions and opinions, and I always found Josh to be super-interesting, lively, curious, and determined to figure out how to perform his "judicial" role as best as possible.

In sum, I have no doubt that Josh will be an excellent law clerk.

If you have any questions about him, please feel free to reach out to me anytime.

With warm best wishes.

Sincerely yours,
Geoffrey R. Stone

Michael Morse
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June 09, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing on behalf of Joshua Leopold to strongly support his application to become your law clerk. Josh is one of the very best students I've taught at the University of Chicago Law School. Having recently clerked for Judge Myron Thompson of the Middle District of Alabama and Judge Marsha Berzon of the Ninth Circuit, I am confident Josh has the writing ability, analytical rigor, and poise to excel in chambers. More than anything, Josh stands out among his classmates for his wonderful enthusiasm for the law —his eagerness to dive into any legal problem makes it easy for me to recommend him with delight and without hesitation.

I have gotten to know Josh well during her first two years at the University of Chicago Law School, where I am a Harry A. Bigelow Teaching Fellow. As part of the Bigelow program, I teach thirty-five first-year law students legal research and writing twice a week for the entire academic year. Josh was a frequent and welcome participant in class discussion. Drawing on his two-years as a paralegal for the Manhattan District Attorney, Josh emerged as one of the very strongest writers in the class. He received a 183 in each quarter, giving him the highest average grade of any student in the class.

Simply put, no student of mine is as curious about and excited by the law as Josh is. Josh has continued to showcase both his enthusiasm and his outstanding writing ability as Articles Editor of the law review. I am very happy that his Essay, "Examining Causation Standards in False Claims Act Cases Predicated on Anti-Kickback Statute Violations," was published on the Law Review's online platform earlier this year.

Beyond his academic accomplishments, Josh is a warm and popular person who has become a critical part of the law school community. As the programming director of the American Constitution Society, Josh is responsible for engaging with wonderful speakers for his fellow students.

Josh and I have spoken at length about his legal career and the different directions it might take—I'm very excited to witness and champion all his future success and sincerely hope you consider him for a clerkship.

I would be happy to talk about Josh at any time. My cell phone is 954-558-7989.

Sincerely,
Michael Morse

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June 09, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

Josh Leopold, a rising third-year student at the University of Chicago, is going to be a superb law clerk. I have gotten to know Josh very well by teaching him in two different courses as well as supervising his Law Review Comment. He is the kind of student I'd feel comfortable recommending to a close friend, secure in the knowledge that Josh will do excellent work in chambers, write wonderfully, leave no stone unturned, and be a team player who is a delightful presence in the workplace. I would trust Josh completely to handle the most sensitive and challenging issues that arise in the law, and I recommend him for a clerkship in your chambers very enthusiastically.

I will begin with my experiences as Josh's Comment supervisor, because in that capacity I got to see Josh's writing and research skills up close, and I've seen how his work has progressed from one draft to the next. Josh's Comment focuses on a novel and important question in intellectual property law, whether certain causes of action arising out of the federal Defend Trade Secrets Act give rise to Article III standing. One might think that if Congress has decided to render improper acquisition of a trade secret or threatened misappropriation of a trade secret violations of federal law, that the issue would be open and shut. But students of recent standing decisions from the Supreme Court have noticed that while Congressional judgments are informative, they are not dispositive. For example, the Court has told us that a "bare procedural violation" of the Fair Credit Reporting Act by itself, does not create an Article III injury in fact, and some circuit courts have held that a data breach itself (and the increased risk of identity theft that may result) similarly does not give rise to standing, unless the data disseminated is damaging to plaintiffs' reputations or identity theft occurs. I have written about these standing issues in recent scholarship, and I've also taught Trade Secrets law so I was a natural faculty advisor given Josh's choice of topics.

The Comment that Josh produced, which I believe he is using as his writing sample, is really terrific. It addresses a live and interesting topic, one that seems likely to reach the federal courts soon. The topic is high-stakes too, given the growth of trade secrets litigation in federal court. Josh does a very nice job of identifying analogies between threatened misappropriation and improper acquisition of trade secrets, on the one hand, and data breach litigation, on the other. There has been a lot of data breach litigation over standing, and about half of the data breach cases brought in federal court are dismissed on standing grounds according to the best empirical study. Josh points out some key similarities between data breaches and these two causes of action under the Defend Trade Secrets Act. He considers counterarguments fully, is judicious in his reading of the cases, and is even-handed in his treatment of the relevant precedents. Were I representing a plaintiff in a suit arising under the Defend Trade Secrets Act I definitely would want to spend the time reading Josh's article, and he provides some very helpful guidance about what harms ought to be pled in a complaint.

With Comment supervisions I can learn as much about a student through the process as the product. I am more skeptical of the standing impediments than Josh is, both as a matter of legal realism and in terms of how I read the admittedly ambiguous precedents. So Josh and I had a robust back and forth as he was preparing his outline and then the various drafts. Invariably when I suggested Josh read an article he hadn't cited or consider a counter-argument he hadn't addressed, the next draft would come back with a thorough and thoughtful discussion of the points I had raised. I encouraged Josh to soften his claims somewhat, to avoid taking a more extreme position than he needed to, and suggested a few important lines of argument and sources to consider. But in other respects the work is all Josh's, from its conception to its execution. And I think it is one of the strongest handful of student Comments I have supervised in my twenty-one years as a professor at Chicago. It is comparable to terrific Comments written by former students who went on to become a partner at Susman Godfrey, for example, and a law professor at Northwestern University, respectively.

Josh's superb performance on his Comment is supplemented by his in-class performance. This past Spring Josh was one of the strongest students in a seminar called Advanced Topics in Law & Computing, which I co-taught with a Computer Science Professor. The seminar had a mixed enrollment, with roughly 55% of the students enrolled in the JD program and another 40% of the students coming from the Computer Science department's PhD program. (One graduate student from the Public Policy school rounded out the cohort.) The seminar was challenging and experimental. All students would be required to read both published appellate opinions and law review articles – the usual fodder for seminars at the law school – and highly technical papers in computer science and data science. Everyone came to the seminar with key gaps in their knowledge as we strove to understand the law and science of artificial intelligence, examined the emerging regulation of deceptive designs online, and worked through legal issues arising from the Computer Fraud and Abuse Act, HIPAA's rules regarding de-identified data sets, the US Census's Bureau's use of differential privacy, the legality of NSA surveillance, and several other topics that are at the intersection of these

two fields.

My co-instructor and I were very impressed by Josh's work product, and he earned a solid A in the seminar (At Chicago even small research seminars must adhere to an unforgiving curve, and most of the JD students earned B grades.) Josh was an active and invariably constructive student in seminar discussion, and he both learned a lot from the Computer Science grad students and taught them a lot about the core legal issues at stake. The three short papers he wrote for the seminar were all smart, meticulously edited, and provocative. It is plain that Josh is a naturally talented writer and a person who finds it interesting to generate creative ideas. Josh brought enthusiasm for his legal studies to the classroom every time we met, and he occasionally stuck around after class or came to office hours to discuss implications and extensions of the legal issues that were germane to the seminar.

Josh's performance as a first-year student in my Elements of the Law course was also strong. He earned an Honors-level grade of 179, writing an examination that was one of the twenty best exams in a 64-student class of Chicago 1Ls. His examination was well-written and displayed a very strong grasp of the material. The examination was the first one that Josh wrote as a law student, and it displayed a lot of potential. In the year and a half since then, Josh's consistently strong performances have shown that he has fully realized the considerable promise I saw at the start of his first year.

I want to close by telling you more about Josh the person and his interests within and outside the law. Josh came to Law School after working as a paralegal for two years in the Public Corruption Unit of the Manhattan DA's office. He loved the research and investigations involved in working for that storied office, and it solidified his desire to attend law school. He also found the work to be quite meaningful, and working on a case brought against correction officers who unlawfully strip-searched inmates' family members who were coming to visit them made a particularly significant impression on him. He plans to work as a litigator after clerking, with particular interests in privacy and data security law, intellectual property, and white-collar criminal work.

A product of Randolph, New Jersey, Josh is the son of a pre-school teacher and an equity analyst for a bank. He was especially close to his paternal grandfather, a World War II veteran who went on to work at Bell Labs as an electrical engineer and served for two terms as the mayor of Livingston, New Jersey. Bob Leopold was the person, more than anyone else, who taught Josh to write and edit, and he was a large part of Josh's life until his death in 2019. Josh has put those communications skills to good use as an Articles Editor on the Law Review and an Event Coordinator in our vibrant ACS chapter. Josh organized upwards of fifteen different ACS events this year, developing ideas for topics and speakers, organizing logistics, and hosting outside speakers. He spearheaded efforts for ACS and FedSoc to host more joint events this year, a worthy endeavor that improves the climate on what are unfortunately increasingly polarized law school campuses. While Josh is certainly left-of-center, he is no idealogue, and he very much enjoys all he has learned on campus from peers and professors who see the world differently.

As I reflect on the student I have had the pleasure of teaching, editing, and mentoring for the last couple of years, the first words that spring to mind in thinking of Josh are energetic, curious, upbeat, smart, and unpretentious. Combining those qualities with his writing acumen and his impressive analytical skills, I can only conclude that both his boss and his co-clerks are going to be a lucky lot.

Sincerely,
Lior J. Strahilevitz

Lior Strahilevitz - lior@uchicago.edu - 773-834-8665

WRITING SAMPLE

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I authored the attached judicial opinion as a final paper for Advanced Criminal Law. The opinion answers whether conviction under the federal programs bribery statute, 18 U.S.C. § 666, requires proof of a quid pro quo. I received permission from the instructor, Judge Thomas Kirsch, to use the opinion as a writing sample. The work is wholly mine and has not been edited by anyone else.

SUPREME COURT OF THE UNITED STATES

No. 23-415

JAMES L. HORAN, PETITIONER *v.* UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

February 20, 2023

We granted certiorari to resolve a circuit split over whether conviction of a federal bribery charge under 18 U.S.C. § 666 ("§ 666") requires the Government to prove a quid pro quo exchange. We answer in the affirmative: § 666 does require a quid pro quo; it does not criminalize mere gratuities.

I. Factual Background

Petitioner James Horan was appointed in 2010 by the Paducah, Kentucky City Council to serve as the Commissioner of the city's Fire Department. At all times relevant, the Department received more than $50,000 per year in federal funds. While serving the city, Horan operated a catering business called Down Home D-Lites ("Down Home").

Early in his tenure, Horan developed a relationship with Nick Simonton, the owner of a radio system distributor called Havis Industries ("Havis"). While Horan was serving the city as commissioner, Simonton hired Down Home to cater Havis's annual barbeque and several personal events. Simonton paid substantially above market rate for Down Home's services. Down Home collected more than $300,000 in revenue from Simonton and Havis for the events.

When Paducah decided it needed to replace its emergency radio network, Horan advocated that the city award the contract to Havis. The city council deferred to Horan's expertise; it awarded the radio contract to Havis without putting it up to a bid, paying $8 million in cash.

Following an investigation, Horan was indicted for federal programs bribery under § 666. The jury convicted after it was not instructed that it was required to find a quid pro quo. The Sixth Circuit affirmed in full.

II. Legal Background and Interpretation

First, we will provide a brief background on § 666. Second, we will interpret the statute. And third, we will illuminate some weighty background concerns that—while not dispositive—inform our decision to mandate that § 666 requires a quid pro quo: federalism, due process, and free speech.

A. Legal Background

In relevant part, § 666 makes it a federal offense for "an agent of an organization" or "state or local official" of an entity that receives more than $10,000 in federal funds to "corruptly" demand or accept "anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more." 18 U.S.C. § 666(a)(1)(B). Section 666 criminalizes the activity of both the bribe receiver, *id.*, and payor. § 666(a)(2).

Section 666 has been dubbed the "holy grail of federal prosecutors." George D. Brown, *Carte Blanch: Federal Prosecution of State and Local Officials after Sabri*, 54

CATH. U. L. REV. 403, 406 (2005). The statute warrants this nickname because its jurisdictional trigger sweeps broadly, covering officials in every state government and almost all local governments. *See* Rohit D. Nath, *Corruption Clarified: Defining the Reach of "Agent" in 18 U.S.C. § 666*, 80 U. CHI. L. REV. 1391, 1391–92 (2013) ("All states and thousands of local governments exceed the $10,000 threshold, so § 666 covers any agent of these state and local governments.").

A circuit split has emerged about whether the Government may obtain convictions for bribery under § 666 in the absence of jury instructions expressly requiring a quid pro quo exchange.

Several circuits have held that § 666 does not require proof of a quid pro quo. *See, e.g.*, *United States v. Abbey*, 560 F.3d 513, 520 (6th Cir. 2009); *United States v. Gee*, 432 F.3d 713, 714 (7th Cir. 2005); *United States v. Zimmermann*, 509 F.3d 920, 927 (8th Cir. 2007); *United States v. Garrido*, 713 F.3d 985, 1001 (9th Cir. 2013); *United States v. McNair*, 605 F.3d 1152, 1188 (11th Cir. 2010). These circuits find that § 666 prohibits both bribes and gratuities—gifts or payments made to officials without a preexisting quid pro quo arrangement. A gratuity criminalized by the statute in these circuits can take the form of a thank-you or bonus for a past act, for example, assuming a jury concludes that the gratuity was meant "to influence or reward." § 666(a)(1)(B), (a)(2).

Other circuits have taken the opposite view, concluding that § 666 does not reach gratuities. *See, e.g.*, *United States v. Fernandez*, 722 F.3d 1, 19 (1st Cir. 2013); *United States v. Hamilton*, 46 F.4th 389, 397 (5th Cir. 2022). These circuits have generally held that conviction requires proof that the defendant intended to

engage in a quid pro quo, an agreement to exchange one thing for another.

B. Statutory Interpretation

When interpreting statutes, we review de novo and "start with the text." *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 218 (1991). Section 666 arguably does not elucidate a clear line between legal and criminal activity; the statute's "boundaries are difficult to limn." *United States v. Cicco*, 938 F.2d 441, 444 (3d Cir. 1991). But we need not determine precisely what § 666 prohibits to conclude that the text suggests a quid pro quo requirement. Again, § 666 criminalizes, *inter alia*, "corruptly . . . solicit[ing] or demand[ing] anything of value" from another with the intention of "be[ing] influenced or rewarded in connection with any business, transaction, or series of transactions." § 666(a)(1)(B). That language evinces a quid pro quo, which this Court has defined as "a specific intent to give or receive something of value in exchange for an official act." *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404–05 (1999). At its core, § 666 targets those who intend to corruptly receive something of value in exchange for influence on a certain transaction. Likewise, the statute targets those who corruptly confer something of value to influence an agent's activity involving a certain transaction. This specific intent to exchange one thing for another—influence for payment, or payment for influence—is a quid pro quo. *See id.* at 404 (finding that bribery requires intent "to influence").

To be sure, our interpretation of 18 U.S.C. § 201 ("§ 201") is instructive because its language and purpose align it closely with § 666. *United States v. Fernandez*, 722 F.3d 1, 20 (1st Cir. 2013) ("[M]uch of the relevant language [in § 666] originates in another

provision, 18 U.S.C. § 201."). Indeed, § 666 was enacted as a "statutory expansion" of § 201. *Salinas v. United States*, 522 U.S. 52, 58–59 (1997). And this Court has previously construed § 666 "in light of" § 201. *Id.* at 58; *see also Northcross v. Board of Ed.*, 412 U.S. 427, 429 (1973) (explaining that where two statutes use similar language and were enacted for related purposes, they "should be interpreted *pari passu*"); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947) ("[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.").

In *Sun-Diamond*, 526 U.S. at 404, we explained that § 201 separately criminalizes two types of activity: subsection (b) covers bribery, while subsection (c) covers illegal gratuities. *See* § 201(b), (c). The "distinguishing feature" between illegal bribes and gratuities is the intent element: bribery requires a "corrupt" intent "to influence" or "to be influenced" in an official act, while an illegal gratuity merely requires that the gratuity be given or accepted "for or because of" an official act. *Sun-Diamond*, 526 U.S. at 404–05. That is, "for bribery there must be a quid pro quo." *Id.* at 404. An illegal gratuity, however, may constitute a reward or gift for an individual's future or past action. *Id.* at 405.

We see § 666 as closely analogous to § 201(b), the bribery portion of § 201. *See* § 201(b). The instrumental words "corruptly" and "influence" appear in both the bribery section of § 201 and § 666; and those words are absent from § 201(c), the gratuities portion of the statute. *See* § 201(b), (c). Meanwhile, the "for or because of" language in the gratuities portion of § 201 does not appear in § 666. *See* § 201(c)(1)(B); *see also* § 666.

Notably, the "for or because of" language in § 201(c) *did* appear in a prior iteration of § 666, but Congress removed it in its 1986 amendment of § 666 "to avoid [the statute's] possible application to acceptable commercial and business practices." H.R. Rep. No. 99-797, at 30 (1986).

Our interpretation of § 666 as requiring a quid pro quo is thus consistent with both our prior interpretation of § 201 and Congressional aims. *See United States v. Wilson*, 503 U.S. 329, 336 (1992) (recounting "the familiar maxim that, when Congress alters the words of a statute, it must intend to change the statute's meaning"). While Congress's 1986 amendment took place before our ruling in *Sun-Diamond*, we cannot ignore that Congress concurrently imported into § 666 key text from the *bribery* portion of § 201 and excised words from § 666 that appear in the *gratuities* portion of § 201. *See Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) (expressing the presumption that Congress does not enact statutes "in a vacuum," and interprets plain text considering "statutes on the same subject").

The Government marshals four responses to the above points. First, it avers that the text does not support a quid pro requirement because, unlike § 201, the statute "makes no mention of an official act or a requirement that anything be given in exchange or return for an official act." *See United States v. Garrido*, 713 F.3d 985, 1001 (9th Cir. 2013) (citation omitted). Second, the Government contends that § 666 does not require an exchange because it features neither the Latin phrase "quid pro quo" nor the word "bribery," both of which would have been easy for Congress to add. Third, it highlights the inclusion of "reward" in § 666 as suggestive of a gratuity offense. And fourth, the

Government distinguishes § 201 from § 666 by arguing that § 666 has less of a need for a limiting principle "because § 666 contains . . . a requirement that the illegal gift or bribe be worth over $5,000." *Id.*

The arguments described above are unconvincing. First, the contention pertaining to "official act" rests on the presumption that the words "official act" are necessary to attach a quid pro quo requirement. Not so. An "official act" is defined as "any decision or action on any question . . . which may by law be brought before any public official, in such official's official capacity." *See* § 201(a)(3). Yet, § 666 targets a different and wider range of individuals than § 201 because § 666 includes as its target "agent[s]" of "organization[s]," while § 201 applies exclusively to federal "public official[s]." *See Salinas*, 522 U.S. at 56. That difference explains the absence of "official act" in § 666: the words "official act" in § 666 would muddy the waters. It is not clear that any individual employed by a private entity has the power to make an "official act," even if the entity is the recipient of considerable federal funds. This is because not all individuals connected to entities receiving over $10,000 in federal funds have the ability to "formal[ly] exercise [ ] government power." *McDonnell v. United States*, 579 U.S. 550, 574 (2016).

Second, we dispense quickly with the argument that § 666's exclusion of "quid pro quo" and "bribery" should dictate our conclusion. While those words would be convenient to elucidate the meaning of § 666, their omission is not dispositive. After all, § 201(b) features neither "quid pro quo" nor "bribery," yet it is well-settled that it only criminalizes quid pro quo arrangements. *Sun-Diamond*, 526 U.S. at 404–05. The plain meaning of § 666—the words "corruptly," "to be

influenced," and "in connection with"—do enough linguistic work to get us to a quid pro quo requirement. *See* § 666(a)(1)(B), (a)(2). We will not rely on statutory silences and ambiguities to read a quid pro quo requirement out of the statute. *See Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 185 (1994) ("[I]t is not plausible to interpret the statutory silence as tantamount to an implicit congressional intent.").

Third, the argument that the inclusion of "reward" necessarily evokes a gratuity is unavailing because, when read with the surrounding words, it becomes clear that "reward" refers to the timing of the quid pro quo. It is implausible that Congress smuggled "reward" into § 666 as a subtle indication that the statute criminalizes mere gratuities. *See Fernandez*, 722 F.3d at 25 ("[I]f Congress did choose to condense bribes and gratuities into a single provision in § 666, it would be odd to do so by merely plugging slightly modified language from § 201(b) . . . into the statute."). The better understanding is that the word reward "serves a more modest purpose: it merely clarifies that a bribe can be promised before, but paid after, the official's action on the payor's behalf." *Id.* at 23 (citation omitted). In short, we endorse the position taken by the circuits that see "influence" and "reward" as denoting different quid pro quo timelines. "Influence" is for payment then action; "reward" denotes promise, action, then payment. *Id.* "Both of these situations involve a quid pro quo, and both therefore constitute bribes. What matters . . . is that the *offer* of payment precedes the official act." *Id.* (emphasis added).

And importantly, the common understanding of "reward" accords with our interpretation. Imagine a

contractor makes an agreement to pay a government employee, contingent on the employee accepting their construction bid. The employee accepts the bid. Shortly thereafter, the contractor pays the employee in accordance with their agreement. This is bribery, a quid pro quo arrangement. Yet, it would be reasonable to say that the contractor has "rewarded" the employee in connection with the transaction. *See* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (2d. College ed. 1982) (defining "reward" as "[s]omething, as money, given or offered especially for a special service").

Fourth and finally, contrary to both the Government's and Ninth Circuit's understanding, § 666 does *not* require that the illegal bribe be worth a minimum of $5,000. *Cf. Garrido*, 713 F.3d at 1001 (stating that § 666 contains "a requirement that the illegal gift or bribe be worth over $5,000"). The modifier connected to the bribe is "anything of value from any person," *see* § 666(a)(1)(B), which by its plain meaning encompass "*all* transfers of personal property or other valuable considerations in exchange for the influence or reward." *See Salinas*, 522 U.S. at 57 (emphasis added); *see also United States v. Townsend*, 630 F.3d 1003, 1010–11 (11th Cir. 2011) (explaining that "'any thing' means quite literally 'any thing whatever; something, no matter what'" (quoting RANDOM HOUSE UNABRIDGED DICTIONARY 96 (2d ed. 1993))). Of course, "anything of value" appears twice in each provision at issue: once in the phrase "*anything of value* from any person, intending to be influenced or rewarded;" and again in the phrase "in connection with any business, transaction, or series of transactions of such organization . . . involving *any thing of value* of $5,000 or more." § 666(a)(1)(B) (emphasis added). But the first

"anything of value" is different from the second, aside from the fact that only the second iteration features "any" and "thing" as two separate words; the important difference is that the statute connects the $5,000 minimum only to the second iteration of "any thing," which modifies the relevant "business, transaction, or series of transactions" that the bribe seeks to influence. *Id*.

Problematically, the reading advanced by the Ninth Circuit and relied upon by the Government "stretches the modifier too far, contrary to the grammatical rule of the last antecedent." *See Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 336 (2005) (citation omitted). The $5,000 minimum connected to the second "any thing of value" cannot extend to the first "anything of value." *See* § 666(a)(1)(B). Moreover, the interpretation violates the canon against superfluity, *see Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 299 n.1 (2006), insofar as it ignores the words "anything of value," which appear before "from any person" and "to any person," in each statutory provision at issue. *See* § 666(a)(1)(B), (a)(2). An interpretation that understands the $5,000 minimum to apply to both the bribe amount and transaction that the bribe seeks to influence renders "anything of value" before "from any person" and "to any person," *id.*, essentially meaningless. Thus, the statute does not contain the limiting principle that the Government claims it does.

In sum, a quid pro quo is the *sine qua non* of bribery, *Sun-Diamond* at 405 ("For bribery, there must be a quid pro quo."), and—at bottom—§ 666 is "a federal *bribery statute* directed at state and local officials." *Ocasio v. United States*, 578 U.S. 282, 296 (2016) (emphasis added); *Salinas*, 522 U.S. at 58–59 (explaining that "the

statutory language demonstrate[s]" that § 666 "was designed to extend [the] federal *bribery* prohibitions of [§ 201] to *bribes* offered to state and local officials") (emphasis added). Even the title of the statute puts the focus on "bribery." *Cf. Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 528–529 (1947) ("[T]he title of a statute . . . cannot limit the plain meaning of the text. For interpretive purposes, [it is] of use only when [it] shed[s] light on some ambiguous word or phrase.").

C. Federalism, Due Process, and Free Speech

Any doubts we have about our interpretation of § 666 are cleared up after scrutinizing the interests that a broad interpretation of the statute would threaten: federalism, due process, and free speech. While these concerns are not dispositive, they undoubtedly cut in favor of a quid pro quo requirement.

Nothing we say below is to suggest that the facts of this case, in and of themselves, necessarily bring to bear constitutional concerns. *See McDonnell*, 579 U.S. at 576. However, "[a] statute should be interpreted in a way that avoids placing its constitutionality in doubt." Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 247 (2012). The criminalization of both bribes and gratuities could allow federal prosecutors in future cases to wield this statue in an unacceptable manner. And as this Court has made clear, "we cannot construe a criminal statute on the assumption that the Government will use it responsibly." *McDonnell*, 579 U.S. at 576.

First, a broad interpretation of § 666 implicates principles of federalism. Making a federal offense out of mere gratuities to local and state actors risks "involv[ing] the Federal Government in setting standards of . . . good government for local and state

officials." *McNally v. United States*, 483 U.S. 350, 360 (1987); *McDonnell*, 579 U.S. at 576 (recognizing a State's "prerogative to regulate the permissible scope of interactions between state officials and their constituents"); *Kelly v. United States*, 140 S. Ct. 1565, 1571–72 (2020) ("[F]ederal fraud law leaves much public corruption to the States (or their electorates) to rectify.").

When interpreting a statute "susceptible of two plausible interpretations," like § 666, this Court has recognized that we ought to "adopt a construction which maintains the existing balance" of state and federal power. *See Salinas*, 522 U.S. at 59; *see also United States v. Bass*, 404 U.S. 336 (1971) (explaining that Congress must speak clearly when it legislates in areas of criminal law that are "traditionally left to the states"). This Court has repeatedly expressed the importance of dual sovereignty and state autonomy. *See, e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). Our structure of joint sovereigns "assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society . . . and it makes government more responsive by putting the States in competition for a mobile citizenry." *Id*. Indeed, in *Fischer v. United States*, 529 U.S. 667, this Court expressed concern about § 666 itself stretching beyond the limits of federalism because a sweeping interpretation could "upset[ ] the proper federal balance." *Id.* at 681. While any federal regulation of state and local officials could arguably be said to wrongly trample on the proper domain of the states, the statute's criminalization of both quid pro quos and mere gratuities would promise to threaten state sovereignty

more than the criminalization of exclusively quid pro quos.

A further concern implicates vagueness, due process, and fair notice, because the contours of § 666 may be unclear by the countless actors covered by the statute. Our vagueness doctrine has addressed concerns about fair notice and arbitrary prosecutions. *See Skilling v. United States,* 561 U.S. 358, 412 (2010). That is, ordinary people may not be able to understand what conduct is prohibited by § 666. And vague statutes leave the interpretation of the law to the discretion of individual prosecutors who already wield breathtakingly broad power. *See* Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. & CRIMINOLOGY 3 (1940).

While we do not go so far as to rule this statute facially void for vagueness, *see Skilling*, 561 U.S. at 404–05 (finding that statutes should be "construed rather than invalidated" where possible), we note that a more "constrained interpretation" of § 666 as criminalizing only a quid pro quo arrangement is warranted because it avoids a "vagueness shoal." *McDonnell*, 579 U.S. at 576 (quoting *Skilling*, 561 U.S. at 368). Indeed, where statutes risk inviting a sweeping expansion of federal criminal jurisdiction, we have demanded a clear statement from Congress. *See, e.g.*, *Cleveland v. United States*, 531 U.S. 12, 24 (2000); *see also Sun-Diamond*, 526 U.S. at 214 ("[A] statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter."). So too here. While we reiterate that the text of § 666 ultimately leads us to the conclusion that the statute does not criminalize mere gratuities, constitutional

concerns inform our decision and assuage doubts about the statute's proper interpretation.

A closely related principle instructs that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Skilling*, 561 U.S. at 411. To be sure, lenity has limits and is only rarely dispositive. *Cf. Smith v. United States*, 508 U.S. 223, 239 (1993) ("The mere possibility of articulating a narrower construction . . . does not by itself make the rule of lenity applicable."). And here, this Court does not view lenity as anything close to dispositive. Rather, it is a thumb on the scale in favor of a narrower interpretation, which is *already* the better reading of the text. *See, e.g.*, *Abramski v. United States*, 573 U.S. 169, 203 (2014) (Scalia, J., dissenting) ("Even if the statute were wrongly thought to be ambiguous on this point, the rule of lenity would defeat the Government's construction.").

We close this Part by pointing out that a broad interpretation of § 666 implicates First Amendment concerns because criminalizing mere gratuities to state and local officials could quell free speech. Again, these concerns are not immediately at issue in the case before us because there is no evidence that Petitioner Horan's activity had anything to do with campaign contributions. Yet, First Amendment concerns come to bear insofar as the Government would have us read § 666 to sweep up gratuities and gifts to public officials. If § 666 were to criminalize gratuities and gifts that merely intend to influence, in the absence of an explicit quid pro quo, First Amendment activity would be chilled. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems,

the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.").

Indeed, in *McDonnell*, 579 U.S. at 576, this Court expressed concern with an expansive interpretation of "official act" in § 201 because such an interpretation could chill public servants from interacting with their constituents (and vice-versa). *See id.* at 575 (explaining that a broad interpretation of the statute "could cast a pall of potential prosecution" over "prosaic" interactions between public officials and "citizens with legitimate concerns"). "The basic compact underlying representative government *assumes* that public officials will hear from their constituents and act appropriately on their concerns." *Id.* (emphasis in original). Of course, *McDonnell* dealt with a statute applicable to federal—rather than state and local—officials, but the concern reflected in *McDonnell* applies with at least equal force to state and local officials. Our democratic system depends on nurturing, not chilling, connections between public officials and their constituents. This is perhaps especially so when those public officials are local actors, rather than federal representatives.

III. Conclusion

Section 666 criminalizes exclusively quid pro quo exchanges, not mere gratuities. The district court's instruction allowed the jury to convict without finding a quid pro quo. For these reasons, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

Applicant Details

First Name	**Mira**
Last Name	**Lerner**
Citizenship Status	**U. S. Citizen**
Email Address	**mlerner@jd24.law.harvard.edu**
Address	**Address** Street **10 Chauncy St., Apt. #1** City **Cambridge** State/Territory **Massachusetts** Zip **02138** Country **United States**
Contact Phone Number	**4126512822**

Applicant Education

BA/BS From	**Franklin & Marshall College**
Date of BA/BS	**May 2020**
JD/LLB From	**Harvard Law School** **https://hls.harvard.edu/dept/ocs/**
Date of JD/LLB	**May 23, 2024**
Class Rank	**School does not rank**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Levi, Leila Jade
llevi@nwlc.org
202-261-2387
Chen, Alexander
achen@law.harvard.edu
6173902656
Minow, Martha
minow@law.harvard.edu
617-495-4276

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Mira Lerner
10 Chauncy St., Apt. #1, Cambridge, MA 02138
(412) 651-2822 | mlerner@jd24.law.harvard.edu

June 12, 2023

The Honorable Juan R. Sanchez
United States District Court, Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street, Room 9613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing to express my interest in a clerkship in your chambers starting in 2024. Although currently a rising third-year student at Harvard Law School, I went to college in Lancaster, PA and have a strong interest in practicing in Philadelphia after graduation.

Attached are my resume, law school transcript, writing sample, and letters of recommendation from the following people:

- Prof. Martha Minow, Harvard Law School, minow@law.harvard.edu, (617)-495-4276
- Prof. Alexander Chen, Harvard Law School, achen@law.harvard.edu, (617)-390-2656
- Leila Jade Levi, National Women's Law Center, llevi@nwlc.org, (202)-261-2387

As you will see from my resume, I would bring experience in public interest litigation and strong legal research, analysis, and writing skills to a clerkship. This spring, I completed an independent writing project with Professor Martha Minow analyzing the implications of *Dobbs v. Jackson Women's Health Organization* for people involved in the U.S. criminal legal system. I also conducted research, drafted memos, and supported *amicus* work for reproductive rights cases in federal courts as an intern at the National Women's Law Center, and this summer, I am performing legal research to support federal policy and legislation at the Center for Reproductive Rights.

I am happy to provide any other information that would be helpful to you. Thank you for your time and consideration.

Sincerely,

Mira Lerner

Mira Lerner

10 Chauncy St., Apt. #1, Cambridge, MA 02138
(412) 651-2822 | mlerner@jd24.law.harvard.edu

EDUCATION

HARVARD LAW SCHOOL, J.D. Candidate, May 2024
Cambridge, MA
Honors: 2023 Harvard Presidential Public Service Fellow
Activities: Harvard Immigration Project, Student Attorney
Alliance for Reproductive Justice, Campus Engagement Chair
Lambda, Inter-School Liaison

FRANKLIN & MARSHALL COLLEGE, B.A. *magna cum laude* in Psychology and Environmental Studies, May 2020
Lancaster, PA
Honors: Phi Beta Kappa; Rouse Scholar (Full tuition merit scholarship awarded to two students per graduating class); Ehleiter Family Award for Sustainable Leadership, 2017; Hackman Summer Scholar, 2018; Dana Scholar, 2017, 2018, 2019; Society for Environmental Population & Conservation Psychology Undergraduate Research Award
Activities: Planned Parenthood Generation Action Chapter, President
The College Reporter, Copy Editor, Staff Writer, Photographer
Diplomatic Congress, Sustainability Chair
Thesis: *The Burden of Climate Action: How Environmental Responsibility is Impacted by Socioeconomic Status*
Study Abroad: School for International Training, Ecuador, Malawi, Italy (studies focused on food security), Spring 2019

EXPERIENCE

CENTER FOR REPRODUCTIVE RIGHTS, *Summer Associate,* Washington, D.C. Summer 2023
Analyzing federal legislation and regulation and conducting legal research in connection with federal policy issues; monitoring and responding to congressional hearings and markups, federal rulemakings, and relevant litigation; and developing and drafting bill analyses, fact sheets, and talking points for use in lobbying activities and outreach.

NATIONAL WOMEN'S LAW CENTER, *Intern,* Washington, D.C. (remote) Fall 2023
Conducted legal research and analysis to support litigation efforts of the Reproductive Rights and Health team; drafted factsheets, talking points, and legal memos; and participated in coalition meetings, events, briefings, webinars, and calls.

LGBTQ+ ADVOCACY CLINIC, *Student Attorney,* Cambridge, MA Fall 2022
Conducted legal research, facilitated coalition meetings, and edited a draft complaint to support impact litigation and policy advocacy projects involving LGBTQ+ rights under the supervision of the Clinic Director, Alexander Chen.

POSITIVE WOMEN'S NETWORK-USA, *Intern,* Oakland, CA (remote) Summer 2022
Developed an advocacy campaign for a federal HIV decriminalization bill; drafted a toolkit, organized a webinar, and set up meetings with representatives; and drafted a research memo on the overlapping legal concerns involved in molecular HIV surveillance and abortion-related health data tracking.

CENTER FOR HEALTH LAW & POLICY INNOVATION, *Research Assistant,* Cambridge, MA Summer 2022
Researched and tracked the accessibility of hepatitis C treatment across state Medicaid programs; reviewed state policies and qualifications for coverage; and created state report cards for advocates and Medicaid enrollees.

PROFESSOR TYLER GIANNINI, *Research Assistant,* Cambridge, MA Spring 2022
Assisted in developing a course on human rights litigation in U.S. courts by researching and writing a memo on historical and potential future use of Section 307 of the Tariff Act of 1930 in human rights litigation.

PARK CITY MOUNTAIN RESORT, *Outdoor Guest Services Agent,* Park City, UT 2020-2021
Greeted guests, fulfilled online ticket purchases, and provided information on the mountain.

PUBLICATIONS

LERNER, M. & ROTTMAN, J. (2021). The Burden of Climate Action: How Environmental Responsibility is Impacted by Socioeconomic Status. *Journal of Environmental Psychology.*

INTERESTS

Rock climbing, backpacking, skiing, baking bread, reading, and crossword puzzles.

Harvard Law School

Date of Issue: June 7, 2023
Not valid unless signed and sealed
Page 1 / 1

Record of: Mira Isabelle Lerner
Current Program Status: JD Candidate
Pro Bono Requirement Complete

JD Program

Fall 2021 Term: September 01 - December 03

1000	Civil Procedure 4 Cohen, I. Glenn	P	4
1001	Contracts 4 Elhauge, Einer	P	4
1006	First Year Legal Research and Writing 4A Medley, Shayna	P	2
1004	Property 4 Singer, Joseph	P	4
1005	Torts 4 Lazarus, Richard	P	4
	Fall 2021 Total Credits:		18

Winter 2022 Term: January 04 - January 21

1052	Lawyering for Justice in the United States Gregory, Michael	CR	2
	Winter 2022 Total Credits:		2

Spring 2022 Term: February 01 - May 13

1024	Constitutional Law 4 Minow, Martha	P	4
2131	Contested Domains: Comparative and International Legal Struggles over Sexual and Reproductive Health and Rights Yamin, Alicia	P	2
1002	Criminal Law 4 Crespo, Andrew	P	4
1006	First Year Legal Research and Writing 4A Medley, Shayna	P	2
1003	Legislation and Regulation 4 Renan, Daphna	P	4
	Spring 2022 Total Credits:		16
	Total 2021-2022 Credits:		36

Fall 2022 Term: September 01 - December 31

2597	Crimmigration: The Intersection of Criminal Law and Immigration Law Torrey, Philip	P	2
2467	Gender Identity, Sexual Orientation, and the Law Chen, Alexander	P	3
2989	Health Care Rights in the Twenty-First Century Costello, Kevin	H	2
8054	LGBTQ+ Advocacy Clinic Chen, Alexander	H	5
	Fall 2022 Total Credits:		12

Winter 2023 Term: January 01 - January 31

7000W	Independent Writing Minow, Martha	H	2
	Winter 2023 Total Credits:		2

Spring 2023 Term: February 01 - May 31

HMS-BETH716	Ethics in Reproductive Medicine	A	2
2079	Evidence Clary, Richard	P	3
8099	Independent Clinical - National Women's Law Center Minow, Martha	CR	4
2394	Prison Law Weiss, Samuel	H	3
	Spring 2023 Total Credits:		12
	Total 2022-2023 Credits:		26

Fall 2023 Term: August 30 - December 15

2000	Administrative Law Sunstein, Cass	~	3
2035	Constitutional Law: First Amendment Weinrib, Laura	~	4
3236	Deliberation Nesson, Charles	~	3
2169	Legal Profession: Public Interest Lawyering Wacks, Jamie	~	3
2540	Reproductive Rights Advocacy Spera, Clara	~	2
	Fall 2023 Total Credits:		15

Spring 2024 Term: January 22 - May 10

2086	Federal Courts and the Federal System Fallon, Richard	~	5
	Spring 2024 Total Credits:		5
	Total 2023-2024 Credits:		20
	Total JD Program Credits:		82

End of official record

HARVARD LAW SCHOOL
Office of the Registrar
1585 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4612
www.law.harvard.edu
registrar@law.harvard.edu

Transcript questions should be referred to the Registrar.

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In accordance with the Family Educational Rights and Privacy Act of 1974, information from this transcript may not be released to a third party without the written consent of the current or former student.

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A student is in good academic standing unless otherwise indicated.

Accreditation

Harvard Law School is accredited by the American Bar Association and has been accredited continuously since 1923.

Degrees Offered

J.D. (Juris Doctor)
LL.M. (Master of Laws)
S.J.D. (Doctor of Juridical Science)

Current Grading System

Fall 2008 – Present: Honors (H), Pass (P), Low Pass (LP), Fail (F), Withdrawn (WD), Credit (CR), Extension (EXT)

All reading groups and independent clinicals, and a few specially approved courses, are graded on a Credit/Fail basis. All work done at foreign institutions as part of the Law School's study abroad programs is reflected on the transcript on a Credit/Fail basis. Courses taken through cross-registration with other Harvard schools, MIT, or Tufts Fletcher School of Law and Diplomacy are graded using the grade scale of the visited school.

Dean's Scholar Prize (*): Awarded for extraordinary work to the top students in classes with law student enrollment of seven or more.

Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
May 2011 - Present

Summa cum laude	To a student who achieves a prescribed average as described in the Handbook of Academic Policies or to the top student in the class
Magna cum laude	Next 10% of the total class following *summa* recipient(s)
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

All graduates who are tied at the margin of a required percentage for honors will be deemed to have achieved the required percentage. Those who graduate in November or March will be granted honors to the extent that students with the same averages received honors the previous May.

Prior Grading Systems

Prior to 1969: 80 and above (A+), 77-79 (A), 74-76 (A-), 71-73 (B+), 68-70 (B), 65-67(B-), 60-64 (C), 55-59 (D), below 55 (F)

1969 to Spring 2009: A+ (8), A (7), A- (6), B+ (5), B (4), B- (3), C (2), D (1), F (0) and P (Pass) in Pass/Fail classes

Prior Ranking System and Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
Prior to 1961, Harvard Law School ranked its students on the basis of their respective averages. From 1961 through 1967, ranking was given only to those students who attained an average of 72 or better for honors purposes. Since 1967, Harvard Law School does not rank students.

1969 to June 1998	General Average
Summa cum laude	7.20 and above
Magna cum laude	5.80 to 7.199
Cum laude	4.85 to 5.799

June 1999 to May 2010
Summa cum laude General Average of 7.20 and above (exception: *summa cum laude* for Class of 2010 awarded to top 1% of class)
Magna cum laude Next 10% of the total class following *summa* recipients
Cum laude Next 30% of the total class following *summa* and *magna* recipients

Prior Degrees and Certificates
LL.B. (Bachelor of Laws) awarded prior to 1969.
The I.T.P. Certificate (not a degree) was awarded for successful completion of the one-year International Tax Program (discontinued in 2004).

NATIONAL WOMEN'S LAW CENTER
Justice for Her. Justice for All.

11 DUPONT CIRCLE NW
SUITE 800
WASHINGTON, DC 20036
202-588-5180
NWLC.ORG

June 12, 2023

To Whom it May Concern:

I am happy to recommend Mira Lerner for a clerkship. I had the pleasure of supervising Mira this spring during her internship with the Reproductive Rights and Health Team at the National Women's Law Center (NWLC). During that time, I was consistently impressed by her ability to manage multiple projects on different timelines, her ability to communicate effectively with supervisors and colleagues alike, and her dedication to reproductive rights advocacy.

Mira worked on several litigation projects and received excellent feedback from our Senior Counsel. For her first assignment, she researched the legislative history of Maryland's IVF law to support NWLC's litigation work challenging state law definitions of infertility that discriminate against LGBTQ+ people. Although she was given until the end of her internship to complete the task, she completed a detailed yet concise summary of findings within a few days.

She continued to exemplify her ability to work independently and produce high quality writing on other projects for the litigation team. Her research was instrumental in preparing an *amicus* brief for a federal case challenging religious refusals for emergency contraception as well as for an administrative complaint to the U.S. Department of Health and Human Services on behalf of a woman denied emergency abortion care at two hospitals. Mira also demonstrated her high level of proficiency in legal research, writing, and analysis by writing a thoughtful memo analyzing whether anti-abortion centers would qualify as covered entities for the purposes of a proposed federal bill.

Mira's research on anti-abortion centers and clinic violence is a fantastic example of her ability to work independently and her attention to detail. She created a spreadsheet for tracking the Department of Justice's enforcement of the Freedom of Access to Clinic Entrances (FACE) Act and drafted talking points for NWLC and coalition partners to use when discussing violence against abortion clinics. Although she was given limited instruction as to what she was to address, she produced a very thorough list of talking points on the purpose and effectiveness of the FACE Act, violence against abortion clinics, anti-abortion centers, and non-carceral tactics to address clinic violence. Her work showed significant knowledge of reproductive justice principles and her ability to write for public audiences.

Through our weekly check-ins, I observed Mira's personal commitment to fighting for increased access to reproductive health care/the public interest through the law. It was evident that she truly enjoyed the projects that she was assigned, and her work will remain useful to our team well into the future.

I have no doubt that Mira will be an asset as a clerk. She is a talented lawyer, a passionate advocate, and a dedicated worker, and I unequivocally recommend her for the position.

Sincerely,

Leila Jade Levi
Senior Counsel, Reproductive Rights and Health

June 05, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

My name is Alexander Chen and I am the Founding Director of the Harvard Law School LGBTQ+ Advocacy Clinic (the "Clinic"), as well as a Lecturer on Law at Harvard Law School. I write to recommend Mira Lerner for a clerkship in your chambers. Mira was a student in my Gender Identity, Sexual Orientation, and the Law class in the fall of 2023 and a student attorney in the Clinic in the same term. Through these experiences, I have observed Mira's promising legal acumen, strong research and writing skills, and diligent work ethic.

I assign a heavy workload of case reading and run my class via the Socratic method. LGBTQ+ law spans the gamut from family and health care law to criminal and constitutional law, and Mira was adept in her grasp of doctrine as we covered cutting-edge legal issues every week. Although Mira fell short of earning an Honors grade in the final exam, her active participation was a valuable contribution to the classroom dynamic and demonstrated to me that she had a good grasp of the relevant doctrine.

As a student attorney, Mira earned an Honors grade for her conscientious work in the Clinic. Mira worked on two projects: a federal civil rights lawsuit in a pre-litigation phase, and a policy project that involved engaging numerous community actors and interest groups. In both projects, Mira displayed a strong degree of professionalism and attention to detail as she engaged in legal research and writing projects in support of these initiatives and interacted with community members and partners.

I also had the pleasure of getting to know Mira through office hours, in which she shared her aspirations to forge a career doing social justice work. I believe Mira would be a worthwhile addition to your chambers, and I would be happy to discuss her candidacy further at (617) 390-2656 or achen@law.harvard.edu if you have any questions.

Sincerely,

Alexander Chen

Founding Director, Harvard Law School LGBTQ+ Advocacy Clinic

June 06, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write to recommend Mira Lerner who has applied to work as your law clerk. She has demonstrated true excellence, initiative, and doggedness in an independent writing project under my supervision and in her intensive work in two clinical placements, and I know that she has the talent and drive to be a very fine law clerk.

We first met when she was student in my Constitutional Law course during her first year of law school. She was not an active participant until she took up the role of advocate in an in-class moot court exercise based on a case pending in the U.S. Supreme Court, addressing state restrictions on the availability of abortions related to diagnoses of Down's Syndrome in the fetus (a case remanded ultimately in light of Dobbs v. Jackson Women's Health Organization). Given her responses in class, I suggested we talk further during my office hours. She really came to life, and we have continued talking and working together since that time. Far more than her class performances, her independent writing and work in legal clinics similarly has allowed Mira to demonstrate her tenacity, commitment to getting details right, and clear and effective writing.

For example, she researched and wrote a detailed paper addressing legal and practical restrictions affecting access to abortions for people facing criminal charges and incarceration. This required imaginative research approaches and persistence. The result is thorough, thoughtful, and useful both for practitioners and academics. It is quite a professional piece of work.

Similarly, I oversaw her work for the National Women's Law Center where she worked with several different lawyers and reported weekly to me with updates and reflections on the cases and discussions. She also wrote an 8-page reflection paper on the experience. The lawyers on-site gave high marks to her work, and I was impressed by how much she accomplished and by her initiative in exploring policy decisions and processes in the office as well as the career journeys of the lawyers.

When she needed an additional credit in another semester, I suggested that she research and write a paper based on interviews with people in several fields of practice that interest her. We worked together on questions to ask, and she synthesized the results into a thoughtful and insightful paper. She also later told me that the effort turned into some of her most valuable experiences during law school, generating meaningful conversations and a network of future advisors.

Mira is likely to pursue a career in combining litigation and ultimately public policy. She already has engaged in meaningful legal work addressing women's rights, issues for people who are incarcerated, advocacy for health care access, representation of people navigating the immigration process, and justice-related advocacy. She gives her all to these efforts and the results for individual clients and for policy reforms are impressive.

The diversity of viewpoints and the pedagogies used in law school at times have led Mira to develop concrete rationales for her commitments, to devise arguments in the moment, and to understand better how people with different views think. She has come to relish the process of debate and discussion; she seeks out and welcomes feedback.

These qualities, combined with her work ethic and intelligence, give me confidence she would be a fine law clerk, and I recommend her to you.

Sincerely,

Martha Minow
300th Anniversary University Professor
Former Dean
Harvard Law School

Martha Minow - minow@law.harvard.edu - 617-495-4276

Mira Lerner
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WRITING SAMPLE

Drafted Spring 2023

The attached is an excerpt from a 32-page independent writing project conducted in the spring of 2023 under the supervision of Professor Martha Minow. The paper, *Prison Abortion and Prison Abolition: Access to Abortions for People Involved in the U.S. Criminal Legal System,* explores options for and challenges to accessing abortions at different phases of the criminal legal process and legal strategies for expanding access to abortions for people experiencing incarceration. Over the course of the semester, I conducted interviews with seven experts from a range of backgrounds and professions, including legal and policy experts, a public defender, a reproductive health care provider, and a formerly incarcerated individual.

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PART II: INCARCERATION AND ABORTION

Due to the transient nature of jails and the fact that prison populations are generally resident for longer terms, the issue of access to abortion care is more likely to arise in jails. It is more likely for someone to enter jail already pregnant than for an inmate to become pregnant in prison where the opportunities for a pregnancy to arise are limited.[1] Occasionally, inmates in prisons become pregnant at the hands of guards, corrections officers, or other inmates even though the Prison Rape Elimination Act makes it illegal for prison staff to have sexual relations with inmates and considers all such relations rape. In clear instances of statutory rape, accessing an abortion may be fairly streamlined (in states with rape exceptions for legal abortions) because the Federal Board of Prisons ("BOP") policy states that it will cover all costs associated with abortion procedures in the case of rape.[2] However, divulging that one has been raped can be fraught with risk for incarcerated individuals. Technically, victims do not have to divulge who the guard was in order to access abortion care, but in reality there can be a significant amount of pressure to reveal the perpetrator's identity for which inmates can face retaliation and discrimination.[3]

According to Dr. Carolyn Sufrin, an obstetrician-gynecologist and assistant professor of gynecology and obstetrics at Johns Hopkins University who used to work in San Francisco County Jail, medication abortions are not available to incarcerated populations in the U.S.,[4] despite the

[1] One study recorded 1,396 admissions of pregnant people into 144 prisons in 12 months and 1,692 admissions of pregnant people into just six jails over the same time period. Carolyn Sufrin et al., *Abortion Access for Incarcerated People: Incidence of Abortion and Policies at U.S. Prisons and Jails*, 0 OBSTETRICS & GYNECOLOGY 1, 4-5 (2021).
[2] U.S. DEP'T OF JUSTICE, FEDERAL BUREAU OF PRISONS, NO. 6070.05, PROGRAM STATEMENT ON BIRTH CONTROL, PREGNANCY, CHILD PLACEMENT AND ABORTION (1996).
[3] Telephone Interview with Norma Wassel, MSW, LICSW, Women & Incarceration Project, Ctr. For Women's Health & Hum. Rights, Suffolk University (Jan. 13, 2023).
[4] Telephone Interview with Carolyn Sufrin, M.D., Ph.D., A.M., Associate Professor of Gynecology & Obstetrics, Johns Hopkins University School of Medicine (Jan. 24, 2023). Dr. Sufrin's research focuses on reproductive health care for incarcerated women. She started a women's health clinic at the San Francisco County Jail and has written extensively based on her ethnographic research with workers and pregnant women at the jail.

Mira Lerner
10 Chauncy St., Apt. #1, Cambridge, MA 02138
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fact that medication abortion has become the most used method in free society. While abortion pills appear to pose an opportunity for expanding access to abortions in carceral facilities, perhaps through telehealth or even smuggling, they are not a realistic option.[5] The experience of self-managing a medicated abortion while incarcerated would be very difficult – menstrual pads, which one would need to manage the bleeding, are notoriously difficult to obtain, and prisoners don't have ready access to treatments for symptoms such as pain and nausea.[6] Furthermore, it would be difficult to hide the symptoms, and if treatment outside of the facility is needed for complications, any transporting officers could potentially find out what happened. The inability to hide a medication abortion from guards and other inmates increases the likelihood that a person will face stigmatization and judgment for their decision.

[Sections A and B removed. Section A described policies governing access to abortions in jails, state prisons, and federal prisons. Section B discussed major challenges facing incarcerated people seeking abortions.**]**

C. Legal Precedent and Opportunities

There is an almost complete dearth of legal record of prisoners challenging prison policies because very few people ever receive legal help for an abortion while incarcerated. If they do, the claims are often settled informally[7] because plaintiffs do not prioritize ongoing litigation and system change as much as immediate relief.[8] Furthermore, different systems have different policies

[5] *Id*.
[6] *Id*.
[7] Diana Kasdan, *Abortion Access for Incarcerated Women: Are Correctional Health Practices in Conflict with Constitutional Standards?* 14 VIEWPOINT 59, 59 (2009).
[8] Telephone Interview with Diana Kasdan, Dir. Of Judicial Strategy, Ctr. for Reprod. Rights (Feb. 7, 2023).

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– written and unwritten – and challenging an unwritten policy makes it very difficult to obtain injunctive relief because plaintiffs must show that the harm will continue to happen. The lack of data with respect to how many people seek, obtain, or are denied access to abortions while incarcerated makes it more challenging to frame the scale of the deleterious consequences these policies engender and contextualize how many people are potentially affected. Even after legal and legislative wins, lack of enforcement of court orders and government policies means that prohibited practices continue illegally. For example, as discussed in Part I, several states have passed anti-shackling laws prohibiting the practice of shackling pregnant people in prisons, but shackling still occurs in those states.

Litigation efforts focused on policy change and injunctive relief can only challenge state facilities. To challenge policy restrictions on access to abortion in federal prisons, plaintiffs would have to sue the BOP. However, the BOP's current policy is arguably as lenient as it can be in regard to abortions within the constraints of the Hyde Amendment. People held in federal facilities can try to sue officers in their individual capacities if they are denied access to abortion care in cases where the pregnant person's life is not in danger and the pregnancy was not a result of rape or incest, but the BOP policy letting staff members opt out of being involved in arranging an abortion[9] provides a ready and solid defense.

i. The 8th Amendment

Before the Supreme Court overturned *Roe v. Wade* in June 2022 and eliminated the constitutional right to abortion, litigation attempting to expand access to abortions for people in prison usually entailed both 14th Amendment and 8th Amendment claims. There are three main

[9] U.S. DEP'T OF JUSTICE, FEDERAL BUREAU OF PRISONS, NO. 5200.07, FEMALE OFFENDER MANUAL (2021).

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cases that challenged policies restricting access to abortions in state prisons from three different federal circuit courts, each coming out a different way: *Monmouth County Correctional Institutional Inmates v. Lanzaro*,[10] *Victoria W. v. Larpenter*,[11] and Roe *v. Crawford*.[12] In both *Monmouth* and *Larpenter,* the prisons had policies that people seeking abortions for any reason other than threat to their own lives were required to obtain a court order.[13] In *Crawford,* the prison had a policy prohibiting transportation for elective, non-therapeutic abortions.[14] Plaintiffs in all three cases alleged that the policy in question was an unconstitutional restriction on the right to abortion in violation of the 14th Amendment and cruel and unusual punishment in violation of the 8th Amendment. The courts in *Monmouth* and *Crawford* both found 14th Amendment violations, but the court in *Monmouth* was the only one to find an 8th Amendment violation. Unfortunately, the constitutional right to abortion was established in *Roe v. Wade,*[15] and the decision in *Dobbs v. Jackson Women's Health Organization*[16] overturning *Roe* shut down the possibility of bringing 14th Amendment due process claims for abortions in prisons.[17] However, the 8th Amendment prohibition on cruel and unusual punishment still applies regardless if abortion is a constitutional right, and lawyers should look to the three pre-*Dobbs* decisions for guidance and ideas on how to strengthen legal arguments for abortion moving forward.

Eighth Amendment claims alleging unconstitutional restrictions on access to abortions rely on *Estelle v. Gamble*. In *Estelle,* the Supreme Court held that deliberate indifference to serious

[10] 834 F.2d 326 (3d Cir. 1987).
[11] 369 F.3d 475 (5th Cir. 2004).
[12] 514 F.3d 789 (8th Cir. 2008).
[13] *Monmouth,* 834 F.2d at 328; *Larpenter,* 369 F.3d at 477.
[14] *Crawford*, 514 F.3d at 792.
[15] 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973*), overruled by Dobbs v. Jackson Women's Health Org.*, 213 L. Ed. 2d 545, 142 S. Ct. 2228 (2022), and *holding modified by Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992).
[16] 213 L. Ed. 2d 545, 142 S. Ct. 2228 (2022).
[17] *Id.* at 2242.

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medical needs of prisoners is cruel and unusual punishment.[18] However, "not all inadequate medical treatment rises to the level of an Eighth Amendment violation; 'It is only such indifference that can offend "evolving standards of decency."'"[19] To succeed on a deliberate indifference to medical needs claim, plaintiffs must first show that their medical need was objectively serious and, second, that officials knew of the need and deliberately disregarded it.[20]

a. Abortion as an objectively serious medical need

One of the biggest hurdles in 8th Amendment abortion litigation is the view that "elective" procedures are not serious medical needs. The court in *Monmouth* found that the "elective" abortions are a serious medical need because denial of abortions would result in tangible harm, and the "elective" classification has no bearing on the seriousness of the medical need.[21] The court in *Crawford,* however, did not view "elective" abortions as serious medical needs, creating a split between the only two circuits to opine on the issue.[22]

An elective procedure in health care is one that can be delayed with no impact on a person's health and well-being, but many medical and legal experts, including Dr. Sufrin and Diana Kasdan (who was part of the legal team that represented the plaintiff in *Roe v. Crawford*), agree that is simply not ever the case with abortions – delaying any abortion is always life-altering.[23] Exceptionalizing abortions in cases of threat to the pregnant person's life is harmful to all people with the capacity to get pregnant because it invalidates other potential justifications for seeking an

[18] *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251 (1976).
[19] *Larpenter*, 369 F.3d at 483 (quoting *Estelle*, 429 U.S. at 106).
[20] *See Farmer v. Brennan*, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811 (1994).
[21] *Monmouth Cty. Correctional Institutional Inmates v. Lanzaro,* 834 F.2d 326, 349 (3d Cir. 1987).
[22] *Roe v. Crawford,* 514 F.3d 789, 799 (8th Cir. 2008). The court in *Larpenter* did not address the lower court's classification of elective abortions as not serious medical needs.
[23] Telephone Interview with Carolyn Sufrin,*supra* note 4; Telephone Interview with Diana Kasdan, *supra* note 8. *See also* DIANA GREENE FOSTER, The Turnaway Study 32 (1ST ED. 2020).

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abortion such as to protect mental health and in instances of pregnancy due to rape and incest. The exceptionalization is particularly harmful for people experiencing incarceration because restrictions on access to abortions are not analyzed under the 8th Amendment outside of the prison context.[24]

One study conducted with 1,000 women over five years found that those who were denied wanted abortions faced increased economic hardship and insecurity, were more likely to stay in contact with violent partners, and experienced more serious physical health problems.[25] The study also revealed that being denied an abortion led to significantly more anxiety and lower self-esteem and life satisfaction.[26] Courts have yet to directly opine on whether threat to mental or emotional health can qualify abortions as serious medical needs, but the Supreme Court has held that abortions can be necessary to prevent harm to mental health,[27] and two circuit courts have indicated that mental health conditions can be serious medical needs for the purposes of the 8th Amendment.[28] Furthermore, LGBTQ+ advocates successfully convinced courts to start recognizing gender dysphoria as a sufficiently serious medical need requiring treatment under the 8th Amendment, partly by relying on affirmations from doctors that it causes mental distress. [29]

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[24] The 5th Amendment and 14th Amendments prohibit the infliction of punishment before conviction. *See Bell v. Wolfish*, 441 U.S. 520, 535, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) ("[A] detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.").
[25] DIANA GREENE FOSTER, *supra* note 17.
[26] *Id.*
[27] *See Doe v. Bolton*, 410 U.S. 179, 192 (1973), *overruled by Dobbs v. Jackson Women's Health Org.*, 213 L. Ed. 2d 545, 142 S. Ct. 2228 (2022).
[28] *See Inmates of Allegheny Cnty. Jail v. Pierce*, 612 F.2d 754, 763 (3d Cir. 1979) ("The failure to provide necessary psychological or psychiatric treatment to inmates with serious mental or emotional disturbances will result in the infliction of pain and suffering just as real as would result from the failure to treat serious physical ailments."); *DePaola v. Clarke*, 884 F.3d 481, 486 (4th Cir. 2018) ("Courts treat an inmate's mental health claims just as seriously as any physical health claims."); *Bowring v. Godwin*, 551 F.2d 44, 47 (4th Cir. 1977) ("We see no underlying distinction between the right to medical care for physical ills and its psychological or psychiatric counterpart.").
[29] *See e.g.*, *Edmo v. Corizon, Inc.*, 935 F.3d 757, 785 (9th Cir. 2019) ("Gender dysphoria is a 'serious ... medical condition' that causes 'clinically significant distress'—distress that impairs or severely limits an individual's ability to function in a meaningful way. DSM-5 at 453, 458."); *Kosilek v. Spencer*, 774 F.3d 63, 86 (1st Cir. 2014) ("That

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As serious as mental and emotional threats can be, there is a qualitative difference between abortions that are necessary due to health risks or potential death and abortions that are necessary because someone does not wish to carry to term.[30] In its decision to return the question of abortion to the states, the Supreme Court did not discuss the importance or necessity of providing access to abortion care, leaving lower courts to parse out important distinctions on their own.[31] Samuel Weiss, a prison litigation expert and lecturer on law at Harvard Law School, does not believe that the decision to overturn *Roe* will undermine arguments that abortion is a serious medical need.[32] He said, from a legal realist perspective, it might even increase the likelihood that courts find such arguments persuasive because to do so will potentially be the only way for sympathetic judges to reach the result they desire.[33]

There have been efforts within the Reproductive Rights movement to discontinue necessary and elective terminology,[34] but such efforts have been unsuccessful because the language is so embedded in 8th Amendment case law for all health care and there is still widespread belief that mental and emotional effects of being denied an abortion are not as serious as physical consequences. Forty-three out of 44 states that prohibit abortions after a certain point in pregnancy have exceptions for cases of threat to the pregnant person's life.[35] However, 30 of

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[gender dysphoria] is a serious medical need, and one which mandates treatment, is not in dispute in this case.); *Keohane v. Fla. Dep't of Corr. Sec'y*, 952 F.3d 1257, 1264 (11th Cir. 2020) ("Most notably, Keohane's FDC treatment team—which comprised her psychologist, her mental-health counselor, and a psychiatric physician assistant—supported the determination that hormone therapy is medically necessary.").

[30] Telephone Interview with Diana Kasdan, *supra* note 8.

[31] *See Dobbs v. Jackson Women's Health Org.*, 213 L. Ed. 2d 545, 142 S. Ct. 2228 (2022).

[32] Interview with Samuel Weiss, Founder & Executive Dir., Rights Behind Bars, in Cambridge, Mass. (Jan. 30, 2023).

[33] *Id.*

[34] Telephone Interview with Diana Kasdan, *supra* note 8.

[35] *State Bans on Abortion Throughout Pregnancy,* GUTTMACHER INSTITUTE (last visited May 20, 2023) https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions.

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those states restrict the exception to threats to physical bodily functions,[36] and 10 states explicitly exclude mental and emotional health as grounds for an exception.[37] To help shift the rhetoric away from necessary and elective language, Diana Kasdan suggests looking to international law and principles that consider access to abortion a human right,[38] as well as case law from other countries with a different understanding of the right to life than what is popularized in the United States.[39]

i. The 14th Amendment

Although the *Dobbs* decision eliminated the possibility of bringing 14th Amendment substantive due process claims against carceral facilities denying access to abortion, the 14th Amendment still provides procedural due process protections for people being detained before trial. The 14th Amendment protects people in state and local facilities from punishment before conviction;[40] however, there are very few reported 14th Amendment cases challenging jail policies that prevent people from accessing abortions,[41] most likely because constant turnover in jails means that claims for injunctive relief moot out easily, and many jails don't have formal policies to challenge.

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[36] *Id*.
[37] *A Review of Exceptions in State Abortions Bans: Implications for the Provision of Abortion Services*, KFF, https://www.kff.org/womens-health-policy/issue-brief/a-review-of-exceptions-in-state-abortions-bans-implications-for-the-provision-of-abortion-services/#:~:text=MENTAL%20HEALTH,-Mental%20health%20conditions&text=In%20addition%2C%20abortion%20bans%20and,explicitly%20exclude%20mental%2Femotional%20health (last visited May 20, 2023).
[38] Committee on the Elimination of Discrimination against Women, L.C. v. Peru, CEDAW/C/50/D/22/2009, para. 8.15; Human Rights Committee, Whelan v. Ireland, CCPR/C/119/D/2425/2-14, para. 7.8; Mellet v. Ireland, CCPR/C/116/D/2324/2013, para. 7.7; K.L. v. Peru, CCPR/C/85/D/1153/2003, para. 6.4; V.D.A. v. Argentina, CCPR/C/101/D/1608/2007, para. 9.3; General Recommendation 35 (2017) on gender-based violence against women, updating general recommendation 19, para. 18; Working Group on the issue of discrimination against women in law and in practice, A/HRC/38/46 (2018), para. 35.
[39] *See e.g., Lakshmi Dhikta v. Government of Nepal*, Writ No. 0757, 2067 (2007) (Supreme Court of Nepal), at 2 (explaining that "[a] fetus is able to exist only because of the mother; if we grant the fetus rights that go against the mother's health or well-being it could create a conflict between the interests of the mother and the fetus, and even compel us to recognize the superiority of the fetus, a situation that would be against the mother. It is not possible to put the mother's life at risk to protect the fetus.").
[40] *See Bell v. Wolfish*, 441 U.S. 520, 535 (1979).
[41] *See, e.g. Bryant v. Maffucci*, 923 F.2d 979 (2d Cir. 1991).

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If someone were to bring a 14th Amendment claim challenging a jail policy preventing access to abortion, the court would have to decide what standard of deliberate indifference to apply. The Supreme Court held that for pre-trial detainee cases alleging excessive force amounting to punishment, plaintiffs do not need to meet the same deliberate indifference standard as for Eighth Amendment claims.[42] Instead, plaintiffs only have to show the objective component (that force was unreasonable) and do not have to show the subjective component (that defendants knew force was unreasonable).[43] A policy preventing access to abortions is a medical issue, though, and would therefore be a conditions of confinement, not excessive force, claim.[44] There is a split in the circuits about whether an objective-component-only standard also applies to conditions of confinement cases: the Second, Sixth, Seventh, and Ninth Circuits said yes, but the Fifth, Eighth, Tenth, and Eleventh Circuits said no.[45] Thus, cases challenging jail policies restricting abortion may be easier to win than cases against prisons, depending on the jurisdiction. However, the objective prong is where the issue of "seriousness" arises in claims against prisons, so the same challenges in getting courts to recognize "elective" abortions as serious medical needs may apply.

[42] *Kingsley v. Hendrickson*, 576 U.S. 389, 395, 135 S. Ct. 2466, 2472, 192 L. Ed. 2d 416 (2015).
[43] *Id.* at 397.
[44] There is "no significant distinction between claims alleging inadequate medical care and those alleging inadequate 'conditions of confinement.' Indeed, the medical care a prisoner receives is just as much a 'condition' of his confinement as the food he is fed, the clothes he is issued, the temperature he is subjected to in his cell, and the protection he is afforded against other inmates." *Wilson v. Seiter,* 501 U.S. 294, 303, 111 S. Ct. 2321, 2326, 115 L. Ed. 2d 271 (1991).
[45] *See Darnell v. Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017); *Brawner v. Scott Cnty., Tennessee*, 14 F.4th 585, 596 (6th Cir. 2021), *cert. denied.* 214 L. Ed. 2d 13, 143 S. Ct. 84 (2022); *Hardeman v. Curran*, 933 F.3d 816, 823 (7th Cir. 2019); *Gordon v. County of Orange*, 888 F.3d 1118, 1124–25 (9th Cir. 2018); *Cope v. Cogdill*, 3 F.4th 198, 208 (5th Cir. 2021), *cert. denied,* 213 L. Ed. 2d 1123, 142 S. Ct. 2573 (2022); *Whitney v. City of St. Louis, Missouri*, 887 F.3d 857, 860 (8th Cir. 2018); *Strain v. Regalado*, 977 F.3d 984, 991 (10th Cir. 2020); *Nam Dang by & through Vina Dang v. Sheriff, Seminole Cnty. Fla.*, 871 F.3d 1272, 1279 (11th Cir. 2017).

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ii. State Claims

Before *Dobbs*, when there was still a federal constitutional right to abortion, there was no state with an explicitly enumerated constitutional right to abortion anywhere in the United States. State courts in California,[46] Alaska,[47] Minnesota,[48] Florida,[49] Montana,[50] and Kansas[51] had recognized a fundamental right to abortion under their respective state constitutions, but there were not many abortion claims brought under state law because courts and individual judges have faced backlash for decisions protecting abortion rights.[52] Now, state abortion protections are becoming stronger than federal protections ever were pre-*Dobbs*, and new doors are opening for litigation in state courts. In November, 2022, Vermont became the first state to explicitly protect abortion rights in its constitution, declaring that an "individual's right to personal reproductive autonomy is central to the liberty and dignity to determine one's own life course."[53] Since then, California and Michigan have also passed constitutional amendments to explicitly secure the right to abortion,[54]

[46] *See People v. Belous*, 71 Cal. 2d 954, 963, 458 P.2d 194, 199 (1969) ("The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex.").
[47] *See Valley Hosp. Ass'n, Inc. v. Mat-Su Coal. for Choice*, 948 P.2d 963, 969 (Alaska 1997) ("[R]eproductive rights are fundamental, and that they are encompassed within the right to privacy expressed in article I, section 22 of the Alaska Constitution.")
[48] *See Women of State of Minn. by Doe v. Gomez*, 542 N.W.2d 17, 27 (Minn. 1995) ("[T]he state constitution protects a woman's right to choose to have an abortion.").
[49] *See Gainesville Woman Care v. State*, 210 So. 3d 1243, 1254 (Fla. 2017) ("Florida's constitutional right of privacy encompasses a woman's right to choose to end her pregnancy."); *In re T.W.*, 551 So. 2d 1186, 1193 (Fla. 1989) ("The Florida Constitution embodies the principle that [f]ew decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision … whether to end her pregnancy. A woman's right to make that choice freely is fundamental.").
[50] *See Armstrong v. State*, 1999 MT 261, ¶ 48, 296 Mont. 361, 379, 989 P.2d 364, 377 (1999) ("[T]he procreative autonomy component of personal autonomy is protected by Montana's constitutional right of individual privacy found at Article II, Section 10.").
[51] *See Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 624, 440 P.3d 461, 471 (2019) ("[S]ection 1 of the Kansas Constitution Bill of Rights acknowledges… the right of personal autonomy. This right allows a woman to make her own decisions regarding her body, health, family formation, and family life – decisions that can include whether to continue a pregnancy.").
[52] *State Constitutions and Abortion Rights*, CTR. FOR REPROD. RIGHTS (Jul. 2022), https://reproductiverights.org/wp-content/uploads/2022/07/State-Constitutions-Report-July-2022.pdf.
[53] V.T. Const. ch. I. art. 22 (amended 2022).
[54] Lindsay Whitehurst, *Abortion rights protected in Michigan, California, Vermo*nt, AP NEWS (Nov. 9, 2022).

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legislators in Nevada, Colorado, Maryland, Rhode Island, Delaware, Massachusetts, and Maine have included express protections for abortions in state laws, [55] and the supreme court of South Carolina ruled that the state's fundamental right to privacy includes protections for abortion.[56]

Bringing cases in state courts has the advantage of avoiding the Prison Litigation Reform Act (PLRA), a federal statute designed to make it harder for prisoners to file suits in federal courts. The PLRA significantly limits the number of cases courts allow to reach discussion of the merits, imposes filing fees on people experiencing incarceration that people who are low-income and not incarcerated are exempt from, caps attorney's fees (decreasing the likelihood of finding representation), imposes barriers to settlement, and erodes court powers to meaningfully change policies.[57] There are also arguments for why state courts may be better venues for cases having to do with pregnancy and bodily autonomy, such as that state judges have technical competency in family law issues and come from more diverse backgrounds.[58]

[55] *After Roe Fell: Abortion Laws by State,* CTR. FOR REPROD. RIGHTS, https://reproductiverights.org/maps/abortion-laws-by-state/ (last visited, Apr. 14, 2023).
[56] *See Planned Parenthood S. Atl. v. South Carolina*, No. 28127 (S.C. Jan. 5, 2023).
[57] Andrea Fenster & Margo Schlanger, *Slamming the Courthouse Door: 25 Years of Evidence for Repealing the Prison Litigation Reform Act,* PRISON POLICY INITIATIVE (Mar. 26, 2021), https://www.prisonpolicy.org/reports/PLRA_25.html.
[58] William B. Rubenstein, *The Myth of Superiority,* 16 CONSTITUTIONAL COMMENTARY 599, 612-613 (1999).

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Applicant Education

BA/BS From	**Rollins College**
Date of BA/BS	**May 2021**
JD/LLB From	**University of Virginia School of Law** **http://www.law.virginia.edu**
Date of JD/LLB	**May 14, 2024**
Class Rank	**School does not rank**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 12, 2023

The Honorable Juan R. Sánchez
U.S. District Court, E.D. Pa.
601 Market Street
Philadelphia, PA

Dear Judge Sánchez:

I am a rising third-year student at the University of Virginia School of Law, and I am writing to apply for a clerkship in your chambers. I expect to receive my J.D. in May 2024 and will be available to work any time after that.

Enclosed please find a copy of my resume, my most recent transcript, and a writing sample. In addition, you should be receiving letters of recommendation from Assistant United States Attorney Charlie Connally (813-624-7347) and Professor Richard Schragger (434-924-3641).

If you have any questions or need to contact me for any reason, please feel free to reach me at the above address and telephone number. Thank you for considering me.

Sincerely,

Rachel C. Lia

Rachel C. Lia

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EDUCATION

University of Virginia School of Law, Charlottesville, VA
J.D., Expected May 2024

- GPA: 3.71
- *Virginia Sports and Entertainment Law Journal*
- Common Law Grounds, President

Rollins College, Winter Park, FL
B.A., Philosophy (Minors: French and English), *summa cum laude*, May 2021

- Dean's Scholarship (merit-based tuition award)
- Athletic Scholarship: Varsity Women's Basketball, Captain
- Thesis: *An Evaluation of Contemporary American Polarization: Useful Perspectives from Three American Philosophers*

EXPERIENCE

Covington & Burling, LLP, Washington, D.C.
Summer Associate, May – July 2023

U.S. Attorney's Office, Middle District of Florida, Criminal Division, Tampa, FL
Summer Legal Intern, May – July 2022

- Drafted government response in opposition to motion for early termination of supervised release
- Researched and wrote memoranda of law to assist in ongoing federal murder-for-hire trial
- Helped compile and translate relevant provisions of French law for purposes of a Mutual Legal Assistance Treaty with France
- Observed proceedings including change of plea hearing, sentencing hearing, jury selection, and jury trial

Legal Aid Society of Eastern Virginia, Norfolk, VA
Winter Break Pro Bono Intern, January 2022

- Drafted complaint and other documents for an uncontested divorce
- Communicated via telephone and email with tenants and landlords to gather necessary documents for Virginia Rental Relief Program applications

Varsity Women's Basketball, Rollins College, Winter Park, FL
Player, August 2017 – May 2021; *Captain*, August 2019 – May 2021

- Managed all facets of team participation in competitive sport including scheduling and leading practices, facilitating team discussions, and intermediating discussions between coaches and players
- Mentored underclassmen and served as team advocate on committees

DOG Street Pub, Williamsburg, VA
Server and Bartender, May – August 2021

National Outdoor Leadership School, Wind River Range, WY
Course Graduate, *Immersive outdoor skills training*, June – July 2019

INTERESTS

Sports, hiking, camping, philosophy

UNIVERSITY OF VIRGINIA
SCHOOL OF LAW

Name: Rachel Lia

Date: June 07, 2023
Record ID: sss4up

This is a report of law and selected non-law course work (including credits earned). This is not an official transcript.

Due to the global COVID-19 pandemic, the Law faculty imposed mandatory Credit/No Credit grading for all graded classes completed after March 18 in the spring 2020 term.

		FALL 2021			
LAW	6000	Civil Procedure	4	B+	Nelson,Caleb E
LAW	6002	Contracts	4	B+	Kordana,Kevin A
LAW	6003	Criminal Law	3	A-	Stevenson,Megan
LAW	6004	Legal Research and Writing I	1	S	Ware,Sarah Stewart
LAW	6007	Torts	4	B+	White,George E
		SPRING 2022			
LAW	6001	Constitutional Law	4	A-	Prakash,Saikrishna B
LAW	6104	Evidence	3	A	Schauer,Frederick
LAW	6005	Lgl Research & Writing II (YR)	2	S	Ware,Sarah Stewart
LAW	7074	Professional Sports & Law	2	A-	Levinstein,Mark S
LAW	6006	Property	4	A	Schragger,Richard C.
		FALL 2022			
LAW	8004	Con Law II: Speech and Press	3	A	Schauer,Frederick
LAW	7019	Criminal Investigation	4	A	Coughlin,Anne M
LAW	7031	Federal Criminal Law	3	A-	Brown,Darryl Keith
LAW	7071	Professional Responsibility	3	B+	Mitchell,Paul Gregory
		SPRING 2023			
LAW	7610	French Public/Private Law (SC)	1	A-	Laazouzi,Malik
		SPRING 2023			
LAW	7018	Criminal Adjudication	3	A	Frampton,Thomas Ward
LAW	9330	Educ in US Prisons Seminar	3	A-	Robinson,Gerard Toussaint
LAW	6105	Federal Courts	4	A	Collins,Michael G
LAW	7650	Litig and Pub Policy (SC)	1	A	Chhabria,Vince
LAW	9081	Trial Advocacy	3	A-	Antony,Nina-Alice

June 13, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing on behalf of Rachel Lia, who I understand has applied for a clerkship in your chambers. Rachel is a terrific person and law student, and I recommend her without hesitation.

Rachel was a student in my first year Property class and received an A in the class. That puts her in rare company. UVA adheres to a strict curve and only a handful of students receive an A grade of any kind. Rachel was one of the few to do so in Property. She wrote an excellent exam—thoughtful, sophisticated, and doctrinally smart. She also did very well in her classes in her second semester of 1L and in her second year. There are a ton of A grades on her transcript, which is very impressive.

Rachel is a Notes Development Editor for the Virginia Sports and Entertainment Law Journal, which is appropriate because she was a varsity women's basketball player at Rollins College, where she led the team as captain. (She is an excellent basketball player.) She graduated summa cum laude from Rollins, with multiple scholarships, while performing at the top of her sport. Her selection as captain of the team is testament to her skills, but also the respect she garnered as a leader of her teammates.

At UVA, she has also thrived. She is the Vice President of Common Law Grounds, an organization that seeks to foster dialogue among law students with different political and philosophical backgrounds and beliefs. She has worked for the U.S. Attorney's Office in Florida and will be spending her summer as an associate with Covington & Burling, in Washington, D.C.— a highly prestigious placement that is well-deserved. Rachel is a hard worker, a strong student, and a natural leader.

She is also a terrific person. I've enjoyed getting to know Rachel since her first year. She has grown remarkably in that time. She is not dogmatic or ideological, but intensely practical. I would not hesitate to have her on my team—she has the intellectual chops, the work ethic, and the personality to succeed in any judicial chambers. I urge you to consider her most seriously.

Please do not hesitate to contact me if I can be of further assistance. I'd be happy to talk about Rachel and answer any questions you might have.

Sincerely,

/s/

Richard C. Schragger
Walter L. Brown Professor of Law
Martha Lubin Karsh and Bruce A. Karsh
Bicentennial Professor of Law
University of Virginia School of Law
580 Massie Road
Charlottesville, Virginia 22903
Phone: 434-924-3641, Fax: 434-982-2845
schragger@law.virginia.edu

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

My name is Charlie Connally, and I am an Assistant United States Attorney in the Middle District of Florida and a former clerk for the United States Court of Appeals for the Eleventh Circuit. Please allow this letter to serve as my recommendation for Rachel Lia for a clerkship in your chambers.

I had the honor and privilege of supervising Ms. Lia at the United States Attorney's Office in the summer of 2022. Ms. Lia was enthusiastic, bright, hardworking, and a great person to be around. Ms. Lia was a valued member of my trial team as we prepared for and tried a double homicide, murder-for-hire, drug conspiracy. Ms. Lia wrote a well written thoroughly researched memorandum on how the use of a car that was driven on the interstate during a shooting constituted the use of a facility of interstate commerce during the commission of the murders.

After securing a conviction in the double homicide case, Ms. Lia again joined my trial team for a felon in possession of a firearm case. I tasked Ms. Lia with writing the opening statement and the direct examination of the main law enforcement officer. Ms. Lia produced an opening statement that could have come from an experienced trial attorney. Ms. Lia's direct examination was equally impressive, she even anticipated possible objections and had written in the correct responses to the objections.

Ms. Lia's immense talent and work ethic were not limited just to trial work. Ms. Lia wrote another thoroughly researched memorandum about if a Florida Felony Battery qualified as a violent felony under the Armed Career Criminal Act. The memorandum contained an in-depth analysis on the categorial approach and the modified categorical approach. Ms. Lia also spoke with me for over 45 minutes about the issue and was able to succinctly explain the issue and the possible issues with the application of the modified categorical approach in actual practice.

I can confidently say that Ms. Lia is one of the best interns I have ever supervised in my nearly 11 years of practice. Ms. Lia's eagerness to learn and humility make her a joy to be around. Ms. Lia would be a great addition to your chambers. I enthusiastically recommend Ms. Lia for a clerkship.

If you have any questions, please do not hesitate to contact me.

Charlie D. Connally
Assistant United States Attorney
Charlie.Connally@usdoj.gov
813-274-6287 (Office)
813-624-7347 (Cell)

Rachel C. Lia

2011 Lewis Mountain Road, Charlottesville, VA 22903 • (757) 634 - 5435 • sss4up@virginia.edu

The attached writing sample is a memorandum that I completed during the course of my internship with the United States Attorney's Office for the Middle District of Florida in the summer of 2022. I received permission from my employer to use this as a writing sample. It does not contain any confidential information. In this memorandum, I address whether a conviction under Florida law of battery on a law enforcement officer qualifies as a "violent felony" for purposes of 18 U.S.C. § 924(e). This work product is entirely my own and has not been edited by anyone else.

MEMORANDUM

TO: Supervising Attorney
FROM: Rachel Lia, Criminal Division Intern

Question Presented

Is a conviction under Florida law of battery on a law enforcement officer considered a "violent felony" for purposes of 18 U.S.C. § 924(e)?

Answer

Probably not, although it's possible. A modified categorical approach to the statute could yield some situations in which a violation of Florida battery on a law enforcement officer *could* qualify as a "violent felony" for purposes of 18 U.S.C. § 924, although practically this is unlikely.

Analysis

Background Law

18 U.S.C. § 924(e)

18 U.S.C. § 924(e)(1) mandates a fifteen-year sentence if someone has violated 18 U.S.C. § 922(g) (which forbids certain categories of individuals from transporting, possessing, or receiving firearms or ammunition when there is an interstate nexus) when the individual in question has three previous convictions (in any court) for violent felonies or serious drug crimes. 18 U.S.C. § 924(e)(1); 18 U.S.C. § 922(g). 18 U.S.C. § 924(e)(2)(B) defines "violent felony" as any crime punishable by imprisonment for a term greater than one year that fits into one of three categories: 1) what is called the "element clause" – felonies which require an element of use, attempted use, or threatened use of physical force, 2) what is called the "enumerated clause" – in which the underlying felony was for burglary, arson, extortion, or involved some use of explosives, or 3) what is called the "residual clause" – felonies which "otherwise involve[] conduct that presents serious risk of physical injury to

another." 18 U.S.C. § 924(e)(2)(B). The residual clause is no longer operable, having been struck down as unconstitutionally vague by the Supreme Court in *Johnson v. United States* (hereinafter *Samuel Johnson*). 576 U.S. 591 (2015).

Florida Battery on a Law Enforcement Statute

In Florida, committing battery on a law enforcement officer (BOLEO) implicates both Fla. Stat. § 784.03, which lays out the elements of battery, and Fla. Stat. § 784.07, which states that knowingly committing battery upon a law enforcement officer is a felony offense. Fla. Stat. § 784.03(1); Fla. Stat. § 784.07(d). The underlying elements of simple battery in Florida, as expressed in Fla. Stat. § 784.03, are "actually and intentionally touch[ing] or strik[ing] another person against the will of the other" or "intentionally caus[ing] bodily harm to another person." Fla. Stat. § 784.03(1). While battery is usually punishable as a misdemeanor, the identity of the victim can ratchet the offense up to a felony (i.e., law enforcement officer or pregnant woman). Fla. Stat. § 784.03; Fla. Stat. § 784.07. "Battery on a law enforcement officer and battery on a pregnant victim thus have as their elements all the elements of simple battery plus the additional element of a particular identity for the victim." *U.S. v. Pickett*, 916 F. 3d 960, 964 (11th Cir. 2019).

Is battery on a law enforcement officer under Florida law considered a "violent felony" for purposes of 18 U.S.C. § 924?

As an initial matter, a Florida conviction of battery on a law enforcement officer is not one of the enumerated violent felonies within 924(e)(2)(B)(ii). In the past, courts have found that Florida BOLEO fit within the "residual clause" of 18

U.S.C. § 924(e)(2)(B)(ii) (*see e.g., Turner v. Warden Coleman FCI*, 709 F. 3d 1328 (11th Cir. 2013)), but such a conclusion is now moot considering the current unconstitutionality of the residual clause. *See Samuel Johnson*, 576 U.S. 591 (2015). Therefore, the only avenue for Florida BOLEO to qualify as a "violent felony" is by satisfying the "element clause" of 18 U.S.C. § 924(e)(2)(B)(i). As a result, the ultimate question is whether Florida BOLEO is a felony which requires an element of use, attempted use, or threatened use of physical force.

Does Florida BOLEO fit within the elements clause of § 924(e)?

In determining whether Florida BOLEO contains an element of use, attempted use, or threatened use of physical force, it is first necessary to determine the requisite showing of force. The Supreme Court established that the element of physical force required in 18 U.S.C. § 924(e) "means violent force – that is, force capable of causing physical pain or injury to another person." *Johnson v. U.S.* (hereinafter *Curtis Johnson*). 559 U.S. 133, 140 (2010).

Categorical and Modified Categorical Approach

When a court evaluates whether a prior felony qualifies as a "violent felony" for purposes of 18 U.S.C. § 922, they are required to utilize a "categorical approach" – meaning they may only consult the underlying elements of the crime charged, and not the particular facts of one defendant's crime. *U.S. v. Vail-Bailon*, 868 F.3d 1293, 1296 (11th Cir. 2017) (citing *Welch v. U.S.*, 578 U.S. 120, 124 (2016)).

In some situations, courts are allowed to instead utilize what is called a "modified categorical approach." *U.S. v. Mathis*, 579 U.S. 500, 500 (2016). This

approach may be utilized when the violation of a statute can be satisfied by several independent methods. *Id.* at 505 (citing *Shepard v. U.S.*, 544 U.S. 13 (2005)). "If the language [of the statute] sets out alternative elements, the statute is divisible." *Dawson v. U.S.*, 294 F. Supp. 3d 1300, 1310 (S.D. Fla. 2018) (citing *Descamps v. U.S.*, 570 U.S. 254, 257 (2013)). If the crime is considered "divisible," then a court may consider extra-statutory documents, referred to as *Shepard* Documents (*see U.S. v. Shepard*, 544 U.S. 13 (2005)), which include the indictment, jury instructions, charging document, plea agreement, etc. (although *not* the Presentence Investigation Report (*see U.S. v. Braun*, 801 F.3d 1301, 1306 (11th Cir. 2015)). *Dawson* at 1312-13. If these documents reveal which independent element within a divisible statute that the defendant was specifically convicted of – the court may consider that element and that element alone in determining whether it qualifies as a "violent felony." *Id.* at 1313. If, however, it is unclear which element was dispositive for the conviction – the court must rely on the *least* of the acts criminalized within the statute when determining whether it constitutes a violent felony. *U.S. v. Davis*, 875 F. 3d 592, 598 (11th Cir. 2017).

In sum, if a predicate crime is divisible, the modified categorical approach allows the court to refer to extra-statutory documents (*Shepard* Documents) to determine which independent method was utilized for conviction. If the *Shepard* Documents clearly show that the defendant was charged and convicted with regards

to a specific disjunctive element, then, the court may consider that piece alone in evaluating whether it qualifies as a "violent felony".

Modified Categorical Approach to Florida BOLEO

Divisibility

Fla. St. § 784.03 lays out the elements of simple battery (which are also the elements of Florida BOLEO) and appears to be clearly divisible as it yields independent methods for breaking the law. "Based on a plain reading of the statute, it appears that [Florida BOLEO] is divisible in two elements." *Dawson* at 1312. It reads:

(1)(a) The offense of battery occurs when a person:

1. Actually and intentionally touches or strikes another person against the will of the other; *Or*

2. Intentionally causes bodily harm to another person.

Fla. St. § 784.03 (emphasis added).

Further evidence that the Florida BOLEO statute is divisible is seen in the Eleventh Circuit's decision in *United States v. Braun*, where the court held that the Florida statute for battery against a pregnant woman was divisible. 801 F.3d 1301 (11th Cir. 2015). Because this statute is analogous to Florida BOLEO in that it is comprised of simple battery on a particular individual, the Eleventh Circuit has functionally ruled that Florida simple battery (Fla. Stat. § 784.03), and by extension, Florida BOLEO, is divisible.

There is inconsistency in caselaw regarding whether Florida battery is divisible in two elements: touching/striking or causing bodily harm (*see Dawson v. U.S.*, 294 F. Supp. 3d 1300 (S.D. Fla. 2018); *see Vann v. U.S.*, No. 16-CV-80853, 2017 U.S. Dist. LEXIS 142117 (S.D. Fla. Aug. 31, 2017)), or whether battery is divisible in three elements: touching, striking, or causing bodily harm (*see U.S. v. Braun*, 801 F.3d 1301 (11th Cir. 2015)). However, the Florida Supreme Court, the final arbiter of state law interpretation, has definitively held that the Florida BOLEO statute is divisible in *three* elements. *State v. Hearns*, 961 So. 2d 211 (Fla. 2007).

Despite the holding in *Hearns*, some federal courts continue to conclude that the Florida battery statute is divisible in two elements. In fact, the Eleventh Circuit held that *felony* battery, (a statute with its own elements, despite the fact that battery on a law enforcement officer is also a battery punished as a felony) a violation of Fla. Stat. § 784.041, is indivisible because its two elements are connected with an "AND" instead of an "OR" (like in 784.03). *U.S. v. Vail-Bailon*, 868 F.3d 1293 (11th Cir. 2017). The first line of Fla. Stat. § 784.041 also contains the phrase "touching or striking," therefore considering the court in *Vail-Bailon* found the totality of that statute to be indivisible, it can be assumed that the court insinuated that "touching or striking" was itself indivisible.

Despite the inconsistency of federal courts in following *State v. Hearns*' interpretation of Florida battery, the following section, in accordance with the *State v. Hearns*' holding, will evaluate whether each of the three disjunctive elements, if any,

could be considered a "violent felony" under the modified categorical approach. These disjunctive elements are as follows: 1) intentionally touching an officer 2) intentionally striking an officer or 3) intentionally causing him bodily harm. Fla. Stat. § 784.03.

"Actually and Intentionally Touching"

The Supreme Court addressed this question in *Johnson v. United States* (hereinafter *Curtis Johnson*). 559 U.S. 133 (2010). The issue before the court was whether or not Florida battery by "actually and intentionally touching" an officer constituted a "violent felony." *Id.* at 135. The court established that the element of physical force required in 18 U.S.C. § 924(e) "means violent force – that is, force capable of causing physical pain or injury to another person." *Id.* at 140. Applying that crucial element of violent force to the Florida BOLEO statute, the Court turned to the Florida Supreme Court's interpretation of Fla. Stat. § 784.07. The Court found that the Florida Supreme Court had interpreted Florida BOLEO's "actually and intentionally touching" phrase to be satisfied by *any* intentional physical contact, "no matter how slight" – even "the most nominal contact" (quoting *State v. Hearns*, 961 So. 2d 211, 219 (Fla. 2007)), and as a result, a conviction by that particular method did not satisfy the violence-focused interpretation of "physical force." 559 U.S. 133, 138 (2010).

Intentionally Striking & **Intentionally Causing Bodily Harm**

The second two divisible elements: "intentionally striking" and "intentionally causing bodily harm" could both be considered to contain the violent force that

Curtis Johnson held was necessary to qualify as a violent felony for purposes of 18 U.S.C. § 924(e). 559 U.S. 133, 140 (2010). As *Vail-Bailon* succinctly explains: "the test set out in *Curtis Johnson* articulates the standard we should follow in determining whether an offense calls for the use of physical force, and that test is whether the statute calls for violent force that is capable of causing physical pain or injury to another." 868 F.3d 1293, 1302 (11th Cir. 2017). Both intentionally striking and intentionally causing bodily harm could very well be understood to contain the requisite element of physical force, although there doesn't appear to be decisive caselaw on this question.

Conclusion

In sum, it would be extremely difficult for a prior conviction for battery on a law enforcement officer under Florida law to qualify as a violent felony for purposes of 18 U.S.C. § 924(e). For a Florida BOLEO charge to be considered a predicate violent felony, the initial charging document (or some other *Shepard* approved document) would need to specify which of the three disjunctive elements of Fla. Stat. § 784.03 the defendant was charged with. Otherwise, there would be no indication of which element the defendant was convicted, therefore requiring the court to consider the least of acts criminalized (pursuant to *U.S. v. Davis*), which is "actually and intentionally touching" – which has already been decided by the Supreme Court to *not* satisfy the element clause of 924(e)(2)(B). *Curtis Johnson*, 559 U.S. 133 (2010). Even if a state prosecutor decided to charge a defendant with a violation of Fla. Stat. § 784.03, specifically with reference to either the "intentionally striking" or

"intentionally causing bodily harm" elements, there is not established precedent that would guarantee either of these would be considered a "violent felony" within a modified categorical approach for purposes of 18 U.S.C. § 924(e). Although, it would seem that "intentionally striking" or "intentionally inflicting bodily harm" on another inherently contains an element of physical force of the violent nature required by *Curtis Johnson*. *Id.* at 140.

From a practical standpoint – because proving "intentional striking" or "intentional bodily harm" is more difficult than proving mere nominal "touching," state prosecutors will usually seek to charge the defendant with the totality of the BOLEO statute, not requiring jury specificity with reference to a divisible element. Unless a state prosecutor preemptively considers later enhancements, Florida BOLEO will not be considered a "violent felony."

Applicant Details

First Name	**Alan**
Last Name	**Litman**
Citizenship Status	**U. S. Citizen**
Email Address	**alitman@pennlaw.upenn.edu**
Address	**Address** Street **529 Valley View Road** City **Merion Station** State/Territory **Pennsylvania** Zip **19066** Country **United States**
Contact Phone Number	**6108888234**

Applicant Education

BA/BS From	**Tufts University**
Date of BA/BS	**May 2019**
JD/LLB From	**University of Pennsylvania Carey Law School** **https://www.law.upenn.edu/careers/**
Date of JD/LLB	**May 16, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**University of Pennsylvania Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Baker, Tom
tombaker@law.upenn.edu
Fisch, Jill E.
jfisch@law.upenn.edu
(215) 746-3454
Goldberg, Mitchell
Goldberg_Chambers@paed.uscourts.gov

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Alan J. Litman
2620 Webster St. Unit A
Philadelphia, PA 19146
Alitman@pennlaw.upenn.edu
(610)-888-8234

June 12, 2023

The Honorable Juan R. Sánchez
United States District Court for the Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street
Philadelphia, PA 19106

Dear Chief Judge Sánchez:

I am a rising third-year law student at the University of Pennsylvania Carey Law School and I am writing to apply for a clerkship beginning in 2024.

I am particularly interested in clerking in your chambers because I grew up in Lower Merion and Philadelphia and I now attend Penn Law School. Most of my family still lives in the Philadelphia area as well. Last summer I worked for the District Court for the Eastern District of Pennsylvania as an intern for Judge Goldberg and want to continue working in the area and serving the community where I was raised.

Attached please find my resume, transcripts, and writing sample. Letters of recommendation from Professor Tom Baker (tombaker@law.upenn.edu, 215-898-7413), Professor Jill Fisch (jfisch@pennlaw.upenn.edu, 215-746-3454), and Judge Mitchell S. Goldberg (Goldberg_Chambers@paed.uscourts.gov, 267-299-7500) are included as well. Please let me know if any other information would be helpful. Thank you.

Respectfully,

Alan J. Litman

ALAN J. LITMAN

2620 Webster St. Unit A, Philadelphia, PA 19146 | 610.888.8234 | alitman@pennlaw.upenn.edu

EDUCATION

University of Pennsylvania Carey Law School, Philadelphia, PA
J.D. Candidate, May 2024

Honors: University of Pennsylvania Law Review
- Online Articles Editor, Vol. 172
- Associate Editor, Vol. 171

Activities: Criminal Record Expungement Project, Democracy Law Project, Jewish Law Students Association

Tufts University, Medford, MA
Bachelor of Arts, International Relations and Political Science, May 2019

Honors: Dean's List, Squash team MVP 2015-16, All-NESCAC team 2017-18

Activities: Varsity Squash, Tufts Animal Aid

EXPERIENCE

Quinn Emanuel Urquhart & Sullivan, LLP, Washington D.C. Summer 2023
Incoming Summer Associate
Expected responsibilities include legal research, document review, and trial preparation.

U.S. District Court for the Eastern District of Pennsylvania, Philadelphia, PA Summer 2022
Intern to the Honorable Mitchell S. Goldberg
Conducted legal research for pending cases and motions. Prepared memoranda with recommendations to judicial law clerks for each motion. Wrote draft opinions in personal jurisdiction and employment discrimination cases. Observed hearings in the Eastern District and the Third Circuit.

LSAT Tutor, Philadelphia, PA June 2021 – March 2022
Freelance
Tutored aspiring law students on the LSAT. Advised dozens of students to help them achieve their desired scores for their law school applications.

Donnelly, Conroy & Gelhaar, LLP, Boston, MA June 2019 – May 2021
Litigation Paralegal
Supported firm's White-Collar Defense and Commercial Litigation Law Practice. Researched procedural issues and court rules for attorneys and court filings. Managed voluminous document productions and all aspects of eDiscovery for multiple cases. Compiled binders and pleadings to help attorneys prepare for hearings and client meetings.

INTERESTS

Squash, Philadelphia sports teams, National Parks, LSAT tutoring

Alan Litman
UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

Fall 2021

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Contracts	Teemu Ruskola	A	4	
Civil Procedure	Jill Fisch	A-	4	
Torts	Tom Baker	A-	4	
Legal Practice Skills	Karen Lindell	P	2	Pass/Fail
Legal Practice Skills Cohort	Vincent Cahill	P	2	Pass/Fail

Spring 2022

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Consumer Law	Tess Wilkinson-Ryan	A	3	
Judicial Decision Making	Judge Anthony J. Scirica	A	3	
Criminal Law	Sandy Mayson	A	4	
Constitutional Law	Mitchell Berman	B	4	
Legal Practice Skills	Karen Lindell	P	2	Pass/Fail
Legal Practice Skills Cohort	Vincent Cahill	P	2	Pass/Fail

Fall 2022

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Corporations	Jill Fisch	A	4	
Evidence	Kimberly Ferzan	A-	4	
Antitrust	Herbert Hovenkamp	A	3	
Anatomy of a Divorce	Robert Cohen	B+	2	
Law Review	----	CR	1	Year-long credit

Spring 2023

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Trademarks and Unfair Competition	Jennifer Rothman	A	3	
Employment Law	Sophia Lee	A-	3	
Litigation Finance	Tom Baker and William Marra	A	3	
Gift and Estate Tax in Practice	Matthew Kamens and Melissa Grossman	B+	2	

Professional Responsibility	Alice Palmer	B	2	

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

June 10, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Clerkship Applicant Alan Litman

Dear Judge Sanchez:

I am writing in support of the application of Alan Litman for a clerkship in your chambers. Alan was a student in my torts class during his first year of law school and in my litigation finance seminar this past semester. Alan was a strong student in torts – consistently prepared and insightful in class – and he wrote an outstanding paper in litigation finance.

Alan's litigation finance paper analyzed the analogy (or not) between liability insurance and plaintiff side third party litigation funding (TPLF) in the context of recent proposals for disclosure of TPLF. Alan analyzed the history and policy reasons behind the rule requiring disclosure of liability insurance, compared those policy reasons to the TPLF context, and developed an impressively modest and innovative disclosure proposal. I have encouraged him to submit the paper for publication as his Law Review comment.

Alan is a quiet, thoughtful person who could easily be missed in a class of strivers – until the time comes for an oral presentation or written work. His oral presentations are crisp, thorough, well organized and persuasive, and his written work is equally impressive.

Alan is focused on becoming an effective litigator, and he regards the clerkship experience as a crucial step in that process. I strongly encourage you to give him that opportunity. He will not disappoint.

Very truly yours,

Tom Baker
William Maul Measey Professor of Law
Tel.: (215) 898-7413
E-mail: tombaker@law.upenn.edu

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

June 10, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Clerkship Applicant Alan Litman

Dear Judge Sanchez:

It gives me great pleasure to recommend Alan Litman, Penn Law JD Class of 2024, for a clerkship in your chambers. Alan was a student both in my 1L civil procedure class in 2021 and in my corporations class last fall. He received an A- in civil procedure and an A in corporations. Alan's performance in my classes was consistent with his overall strong academic performance in law school. As you know, Penn Law does not release class rank information for its students, but in my experience grades like these would place Alan within the top 20% of his class. Alan's work as an editor of the Law Review as well as his internship last summer for Judge Mitchell Goldberg in the Eastern District of Pennsylvania have strengthened his writing skills, and the internship in particular, has highlighted to him the value of a clerkship.

Beyond class, I got to know Alan through his participation in office hours. Alan is an engaged and enthusiastic student. His approach to his career has been informed and professional, and I believe a clerkship will be highly useful in preparing him for his intended future work as a litigator. I also believe that he would be a strong clerk and a pleasure to work with in chambers.

I would be delighted to follow up by phone to convey my enthusiasm and support.

Sincerely,

Jill E. Fisch
Saul A. Fox Distinguished Professor of Business Law
Co-Director, Institute for Law and Economics
Tel.: (215) 746-3454
E-mail: jfisch@law.upenn.edu

United States District Court
EASTERN DISTRICT OF PENNSYLVANIA

MITCHELL S. GOLDBERG
JUDGE

UNITED STATES COURTHOUSE
601 MARKET STREET
SUITE 17614
PHILADELPHIA, PA 19106
TEL (267) 299-7500

March 15, 2023

Re: Alan Litman

To Whom It May Concern:

I understand that Alan Litman is presently seeking a clerkship in your chambers. I appreciate the opportunity to provide some feedback and my impressions of Alan.

Alan clerked in our chambers during the summer following his first year at Penn Law. Alan assisted with several substantive motions, including a motion to dismiss a copyright case, and a factually complex summary judgment motion in an employment discrimination case. Alan's research and writing skills were impressive, and his work product was consistently thoughtful and concise. Alan also showed an eagerness to learn and improve throughout his time in the courthouse and regularly sought out opportunities to assist with legal matters in chambers.

Alan has been offered a position with Quinn Emanuel's D.C. office upon his graduation, which speaks to his abilities. Additionally, his academic performance at Penn Law has been exceptional.

Alan is personable, positive, and well-spoken. Based on my experience with him during the summer of 2022, I would recommend Alan for a clerkship position.

Please don't hesitate to reach out if I can provide any further information about Alan.

Sincerely,

M. Mitchell Goldberg

Mitchell S. Goldberg

Alan Litman

2620 Webster St. Unit A, Philadelphia, PA 19146 | 610.888.8234 | alitman@pennlaw.upenn.edu

Writing Sample

This writing sample was written for a litigation finance seminar and for my law review student comment. In debating whether litigation funding should be required to be disclosed in litigation, I noticed many pro-disclosure advocates compare litigation funding disclosure for plaintiffs to the already-required insurance disclosure for defendants. I wrote this paper to take a closer look at whether the arguments that led to the insurance disclosure requirement are actually applicable to the litigation funding context. While the final version of this paper was nearly 50 pages, I've removed a significant amount of content for ease of readability. As a consequence, many of the internal cross-references may point to omitted sections. I tried to leave most of my analysis intact and am able to send the full paper if it would be helpful. One of my seminar professors provided high-level feedback on the topic and substance, but the writing itself is entirely my own. Thank you.